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No. 05-1284

IN THE

Supreme Court of the United States

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION; AND PHILIP MORRIS, INCORPORATED, A CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

STEVEN EUGENE CAULEY
MARCUS N. BOZEMAN
CAULEY, BOWMAN, CARNEY & WILLIAMS, PLLC
11311 Arcade Drive
Suite 200
Little Rock, Arkansas 72212
(501) 312-8500

DAVID C. FREDERICK
Counsel of Record
KELLY P. DUNBAR
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Petitioners

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QUESTION PRESENTED

Whether a private actor doing no more than complying with federal regulation is a "person acting under a federal officer" for the purpose of 28 U.S.C. § 1442(a)(1), entitling the actor to remove to federal court a civil action brought in state court under state law.

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Petitioners Lisa Watson and Loretta Lawson, individually and on behalf of all others similarly situated, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

INTRODUCTION

This case presents issues of exceptional importance to the balance of judicial authority between the state and federal judicial systems. Before the court of appeals, defendant Philip Morris argued that this case – a class action brought under Arkansas law related to Philip Morris's marketing and promotion of light cigarettes – "is exactly the type of case for which the federal officer removal statute was created." Appellee's Br. 34. The Eighth Circuit agreed with that extraordinary proposition, holding that Philip Morris was a "person acting under" a federal officer. 28 U.S.C. § 1442(a)(1). The court held that Philip Morris had a right to defend this action in federal rather than state court, simply because Philip Morris was subject to comprehensive and detailed regulation by the Federal Trade Commission ("FTC") in marketing and promoting its light cigarettes. That holding is at odds with this Court's precedents, conflicts with the text and purpose of the statute, defies common sense, and furthers already profound confusion in the federal courts as to the proper interpretation of the statute.

The Eighth Circuit's decision is not an aberration, but rather reflects a pervasive confusion in the federal courts concerning the proper interpretation of the federal officer removal statute in cases involving private parties. The courts of appeals have articulated markedly differing tests for when a private actor is "acting under" a federal officer within the meaning of the statute. The First, Seventh, and Eleventh Circuits, for example, have embraced an official function approach that looks to whether a private actor is standing in the shoes of a federal officer in enforcing federal law. Under the law of those circuits, Philip Morris unquestionably does not qualify as a person

"acting under" a federal officer and is thereby not entitled to remove an action to federal court. The Eighth Circuit followed the Fifth Circuit, however, in making dispositive the comprehensiveness and detail of federal control over the activities of a private actor. And, in the Ninth and Tenth Circuits, a private actor must show only that it is under the general supervision of a federal officer. The current articulation of "acting under" in four circuits, therefore, differs markedly from the official function test adopted by three circuits.

This Court's review is urgently needed to bring clarity to the test for determining if and when a private actor is "acting under" a federal officer for purposes of federal officer removal. Left uncorrected, the Eighth Circuit's approach to interpreting § 1442(a)(1) will have significant consequences. By radically expanding the category of cases in which removal is appropriate, the Eighth Circuit's rule threatens the established interest of States in having state courts be the primary forums for the adjudication of state law. The Eighth Circuit's rule will invite regulated parties of all types to remove cases from state court, based on no more than artful characterizations of the regulatory regime to which the party is subject. Channeling ordinary state lawsuits to federal courts in this manner will drastically stretch federal judicial resources and undermine the interests of States in having their judicial systems available to vindicate the interests of their citizens.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-19a) is reported at 420 F.3d 852. The district court's opinion denying petitioners' motion to remand (Pet. App. 20a-60a) is unreported (but available at 2003 WL 23272484).

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2005. A petition for rehearing was denied on November 18, 2005. *See* Pet. App. 61a. On February 9,

2006, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including March 20, 2006, and on March 14, 2006, further extended the time within which to file a petition to and including April 17, 2006. *See id.* at 100a-101a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutes are set forth at Pet. App. 98a-99a.

STATEMENT OF THE CASE

A. The Federal Officer Removal Statute

The federal officer removal statute, 28 U.S.C. § 1442(a), governs the removal to federal court of criminal and civil actions in which federal officers and agencies are defendants. The statute provides that "[a] civil action . . . commenced in a State court . . . may," in certain circumstances, "be removed . . . to the district court of the United States for the district and division embracing the place wherein it is pending." 28 U.S.C. § 1442(a). The first subsection of § 1442(a) defines one such circumstance as when "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, [is] sued in an official or individual capacity for any act under color of such office." *Id.* § 1442(a)(1). By providing federal officers with the statutory right to remove a civil action based on state law, § 1442(a)(1) functions as an exception to the well-pleaded complaint rule. *See generally Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

"The federal officer removal statute has had a long history." *Willingham v. Morgan*, 395 U.S. 402, 405 (1969). The first federal officer removal statute was enacted during the War of 1812. *See* Richard H. Fallon, Jr., *et al.*, *Hart & Wechsler's The Federal Courts and the Federal System* 951 (4th ed. 1996) ("Hart & Wechsler"). The provision "was part of an attempt to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular."

Willingham, 395 U.S. at 405. To that end, the statute provided for the removal of actions brought in state court against "any collector, naval officer, surveyor, inspector, or any another officer . . . or any other person aiding or assisting" in enforcing the customs provisions of the act. Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198. By its terms, the removal provision expired at the end of the war. *See Willingham*, 395 U.S. at 405.

The next iteration of a federal officer removal statute came in the Force Act of 1833, enacted in response to South Carolina's threat of nullification. *See* Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 632, 633-34. *See generally* Hart & Wechsler at 951. The removal provision of that Act authorized the removal of suits against federal officers or "other person[s]" on account of acts done in enforcing the customs laws. § 3, 4 Stat. 633.

Congress enacted a new series of federal officer removal statutes during the Civil War, authorizing the removal of cases brought against federal officers for acts committed during the rebellion and justified under the authority of the President or Congress. *See* Hart & Wechsler at 951. These provisions "were eventually codified into a permanent statute which applied mainly to cases growing out of enforcement of the revenue laws." *Willingham*, 395 U.S. at 405-06. The permanent removal statute was amended several times prior to 1948, at which time the statute was broadened, as a part of the Judicial Code of 1948, to include *all* federal officers. *Id.* at 406.

In 1996, Congress amended § 1442(a)(1) to include federal agencies within the compass of the removal provision. *See* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 206, 110 Stat. 3847, 3850.

B. FTC "Regulation" of Light Cigarettes

In the 1950s, the FTC became alarmed about the accuracy of representations made in cigarette advertising about the tar and nicotine content of cigarettes. The FTC published guidelines "advising manufacturers to make no

representations about the tar and nicotine content of a cigarette that could not be supported with reliable scientific evidence." *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37 (D.C. Cir. 1985).

In 1967, the FTC sought to standardize tar and nicotine testing by endorsing a method to test the tar and nicotine levels of cigarettes known as the Cambridge Filter Method. *See id.*; *see also Cigarettes: Testing for Tar and Nicotine Content*, 32 Fed. Reg. 11,178 (1967). The Cambridge Filter Method was intended to provide a means for making factual statements in advertising about tar and nicotine content of cigarettes. In August 1970, the FTC sought comment on a formal agency rule that would have made it "an unfair or deceptive act or practice . . . to fail to disclose, clearly and prominently, in all advertising the tar and nicotine content [of the cigarettes] . . . based on the most recently published" data resulting from tests using the Cambridge Filter Method. *Advertising of Cigarettes*, 35 Fed. Reg. 12,671, 12,671 (1970).

Later that year, however, five leading cigarette companies, including Philip Morris, agreed to a "voluntary program" by which the companies would disclose tar and nicotine data culled from FTC test results on advertising, although cigarette companies have never entered into any such agreement regarding labeling on packages or cartons. *See* Federal Trade Commission, *Report to Congress*, App. C (Dec. 31, 1970). Upon reviewing the voluntary agreement, the FTC suspended its proposed rulemaking indefinitely. *Brown & Williamson Tobacco Corp.*, 778 F.2d at 37.

C. Proceedings in State and District Court

This case arises out of a civil action brought against Philip Morris by Lisa Watson and Loretta Lawson in Arkansas state court for violations of Arkansas state law. Petitioners, acting on behalf of a class of all persons who purchased two brands of so-called "light" cigarettes – *viz.*, Marlboro Lights and Cambridge Lights – in Arkansas, have alleged that Philip Morris engaged in unfair and

deceptive business practices in connection with promoting and marketing its light cigarettes.

Specifically, petitioners' complaint alleges that Philip Morris, "[w]hile marketing and promoting decreased tar and nicotine deliveries, . . . designed Cambridge Lights and Marlboro Lights to register lower levels of tar and nicotine on the [Cambridge Filter Method] . . . than would be delivered to the consumers of the product." Pet. App. 63a-64a (¶ 9). Petitioners have averred that Philip Morris falsely represented its cigarettes as light or low tar by "[i]ntentionally manipulating the design and content" of its cigarettes to lower artificially the results of the testing method used to measure tar and nicotine levels. *See id.* at 64a-65a (¶¶ 12-13). Based on those allegations, petitioners seek relief under the Arkansas Deceptive Trade Practices Act (Counts I and II).

Philip Morris removed petitioners' action to the United States District Court for the Eastern District of Arkansas, relying on, among other provisions, the federal officer removal statute. Philip Morris argued that removal of a "private party [is appropriate] where it is sued for actions taken under the direction of a federal officer." *Id.* at 76a. Philip Morris insisted that "[t]he 60-year history of FTC mandates" caused Philip Morris to be a federal officer or a "person acting under" a federal officer. *Id.* at 88a.

Philip Morris argued further that it had a "colorable federal defense" because petitioners' claims "inevitably conflict with the FTC's policy judgments, giving rise to a valid preemption defense." *Id.* at 90a-91a. Philip Morris also maintained a causal connection existed between FTC regulation and the challenged acts because petitioners sought to impose liability "for conduct . . . that was undertaken at the express direction" of the FTC. *Id.* at 92a.

Petitioners moved to remand the case to Arkansas state court, challenging Philip Morris's entitlement to avail itself of § 1442(a)(1). Petitioners argued that they were not challenging the use of FTC testing procedures "but rather the company's deceptive practices in labeling its products

as low tar and nicotine . . . accomplished by manipulation of the [FTC] testing procedures." Appellants' Br. xii (citing Motion for Remand ¶¶ 4-5). Furthermore, petitioners maintained that Philip Morris's marketing of light cigarettes subject to FTC regulation did not make the company a "person acting under" a federal officer. *Id.*

On December 12, 2003, the district court denied petitioners' motion to remand. The court held that "[t]he 'person acting under' element and the causal nexus element tend to converge into a single issue: whether the actions that form the basis of the state suit were performed pursuant to comprehensive and detailed federal government regulation." Pet. App. 36a. After surveying the landscape of federal cases passing on the subject, the court then held that, because FTC "regulation of cigarette testing and advertising spans over forty years and is detailed and specific," "Philip Morris acted under the direction of a federal officer within the meaning of § 1442(a)(1) when it cited the tar and nicotine values derived from the FTC Method in its [cigarette] advertisements." *Id.* at 41a.

Recognizing that its decision expanded the scope of § 1442(a)(1) and created a split in the federal courts, the district court certified the question for interlocutory review under 28 U.S.C. § 1292(b). *See id.* at 57a-60a.

D. The Court of Appeals' Decision

The Eighth Circuit affirmed the district court's denial of petitioners' motion to remand. The court of appeals opined that it was obliged not to give § 1442(a)(1) a "'narrow' or 'limited' interpretation." Pet. App. 4a. The court then held that Philip Morris qualified as a "person acting under" a federal officer, even though it noted that that decision was contrary to that of "every other district court confronted with tobacco companies alleging they were acting under a federal officer." *Id.* at 6a. In holding that Philip Morris *was* entitled to invoke § 1442(a)(1), the Eighth Circuit articulated a test that looked to whether the FTC exercised "comprehensive, detailed regulation" over Philip Morris. *See id.* at 8a; *see also id.* at 6a

(whether "acting under" condition is satisfied depends on "detail and specificity of the federal direction of the defendant's activities"). Relying primarily upon analogy to the Fifth Circuit's decision in *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387, 398 (5th Cir. 1998), the Eighth Circuit held the FTC did exercise "comprehensive, detailed regulation" over Philip Morris, and thereby satisfied the "acting under" condition. Pet. App. 7a-8a.

Furthermore, the court deemed it irrelevant that the FTC "regulations" that Philip Morris claimed rendered it a federal officer were never adopted and that the industry acted by voluntary agreement. The court decided that "[t]he FTC effectively used its coercive power to cause the tobacco companies to enter the agreement." *Id.* at 10a.

The Eighth Circuit also held that a causal connection existed between Philip Morris's challenged conduct and the acts regulated by the FTC. The court explained that petitioners' complaint both "directly implicates the enforcement and wisdom of the FTC's tobacco policies" and "challenge[s] the FTC's policy judgment that despite the failure of the Cambridge Filter Method . . . the test results should still be included in advertising." *Id.* at 15a-16a.

In addition, the Eighth Circuit decided that, although petitioners' claims were entirely under Arkansas state law, Philip Morris had a colorable federal defense of preemption that supported its claim to removal under the federal officer removal statute. *Id.* at 16a-18a.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's decision that Philip Morris may remove to federal court further divides the courts of appeals on the important jurisdictional issue of when a private actor is "acting under" a federal officer such that the party may avail itself of the federal officer removal statute. The First, Seventh, and Eleventh Circuits have each adopted a framework for interpreting the "acting under" requirement that looks to whether a private actor is performing an official governmental function; under that

framework, removal jurisdiction for Philip Morris would have been improper. The Eighth Circuit, however, followed an approach similar to that of the Fifth Circuit in making dispositive the detail or comprehensiveness of federal control. By contrast, the Ninth and Tenth Circuits have each held that general supervision by a federal officer may be sufficient to support removal jurisdiction.

This Court's review is needed to give clarity to an important jurisdictional provision aimed at maintaining a proper division between state and federal judicial authority when federal officers are sued in state court. Absent correction by this Court, the Eighth Circuit's decision encourages private regulated actors of all types to assert an immunity from suit in state court for alleged violations of state law based on nothing more than that the party is subject to comprehensive and detailed federal regulation.

THE EIGHTH CIRCUIT'S DECISION DIVIDES THE FEDERAL COURTS ON SIGNIFICANT ISSUES PERTAINING TO THE PROPER APPLICATION OF THE FEDERAL OFFICER REMOVAL STATUTE

A. Federal Courts Are Divided Or Otherwise In Disarray With Respect To When A Private Party Is "Acting Under" A Federal Officer Within The Meaning Of § 1442(a)(1)

The courts of appeals are deeply divided over the legal test for determining when a private party is "acting under" a federal officer.[1] Although the "acting under" clause

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[1] Ordinarily, a division among the courts of appeals signals most plainly the need for this Court's intervention. Although that is also true here, we also highlight the deep confusion among the district courts because an order granting or denying a motion to remand to state court is not reviewable on interlocutory appeal. *See* 28 U.S.C. § 1447(d) ("order remanding a case to the State court from which it was removed is not reviewable on appeal"); *Angelides v. Baylor College of Medicine*, 117 F.3d 833 (5th Cir. 1997) (no jurisdiction under § 1447(d) or collateral order doctrine to review remand order); *Krangel v. General Dynamics Corp.*, 968 F.2d 914, 915 (9th Cir. 1992) (per curiam) (declining to make exception to § 1447(d) for "orders deciding important legal issues for the first time"); *In re Diet Drugs Prods. Liab. Litig.*, 93 Fed.

serves a crucial function in differentiating private parties from federal actors, courts of appeals' decisions interpreting the clause run the gamut from those holding that a private party availing itself of the statute must be carrying out official governmental functions, to those requiring comprehensive and detailed federal control over the removing party, to those looking only to whether the federal government exercises *any* control, broadly defined. Philip Morris made a similar point before the Eighth Circuit, arguing that "[c]ourts have articulated different legal tests to describe the level of federal direction necessary to bring a defendant within the 'acting under' provision of the federal officer removal statute." Appellee's Br. 35.[2]

1. The First, Seventh, and Eleventh Circuits have adopted an official function test

In *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482 (1st Cir. 1989), the First Circuit upheld removal by a telephone company sued for its alleged involvement in electronic surveillance by federal agents. *See id.* at 486. The plaintiffs specifically alleged that the

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Appx. 345, 348 (3d Cir. 2004) (court of appeals lacked appellate jurisdiction, under 28 U.S.C. § 1291, to entertain appeal from denial of motion to remand; jurisdiction was not proper under collateral order doctrine). Many cases, therefore, that would further demonstrate the divergent approaches of the courts simply do not reach the courts of appeals for lack of appellate jurisdiction. Petitioners accordingly look both to the federal courts of appeals and to the federal district courts – the forums in which, as a practical matter, this important jurisdictional issue is often ultimately resolved – to demonstrate the urgency of action by the Court.

[2] *See also McMahon v. Presidential Airways, Inc.*, 410 F. Supp. 2d 1189, 1196 (M.D. Fla. 2006) (observing that "there are varying formulations of the test for removal under the federal officer provision"); *Lalonde v. Delta Field Erection*, No. Civ. A. 96-3244-B-M3, 1998 WL 34301466, at *2 (M.D. La. Aug. 6, 1998) ("Neither the Supreme Court nor the Fifth Circuit have established what is required to show that a government contractor is 'acting under' an officer of the United States or of an agency thereof. Cases from other federal district courts . . . vary in their approach to what is required under this element.").

telephone company "wiretapped and/or offered technical assistance to federal agents to wiretap." *Id.* Without a word as to whether federal control over the telephone company was comprehensive or detailed – the factors deemed dispositive by the Eighth Circuit – the First Circuit there held that the defendant's "involvement in the electronic surveillance" – which was "official government business" – "was strictly and solely at federal behest." *Id.*[3] Thus, the First Circuit's approach makes the official or private character of the performed acts determinative of whether the private actor is "acting under" the federal officer for removal purposes.

In *Venezia v. Robinson*, 16 F.3d 209 (7th Cir. 1994), the Seventh Circuit adopted a comparable approach – looking to whether the removing party was acting in an official capacity in enforcing federal law – in deciding whether a state officer was entitled to removal under § 1442(a)(1). In that case, a civil suit was brought against an officer of the Illinois Liquor Control Commission in connection with a seizure of video gaming machines. The state officer sought removal on the ground that he was acting as a part of an FBI investigation and thus was a "'person acting under' a federal agent." *Id.* at 211. The court of appeals agreed, reasoning that "[a] federal agent or informant who asserts that he was (or is) acting *in the course of a criminal investigation* is entitled to remove under § 1442(a)(1), presenting to the federal tribunal all questions of justification and immunity." *Id.* at 212 (emphasis added).[4]

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[3] *Cf. Maine Ass'n of Interdependent Neighborhoods v. Commissioner, Maine Dep't of Human Servs.*, 876 F.2d 1051, 1054 (1st Cir. 1989) (Breyer, J.) (commissioner of state agency "might be considered a 'person acting under' the Secretary [of Health and Human Services]" insofar as state agency is "*administering* the AFDC rules and regulations") (emphasis added).

[4] The Seventh Circuit's decision has been viewed by a district court outside that circuit as supporting the notion that private parties performing official governmental functions may be entitled to be treated

The Eleventh Circuit followed a similar path in *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424 (11th Cir. 1996). There, the court of appeals upheld a refusal to remand to state court a state-law action for negligent inspection and wrongful certification of an aircraft engine. The Eleventh Circuit, consistent with the First and Seventh Circuits, found that the defendant, an "authorized agent of the [Federal Aviation Administration ("FAA")]," was entitled to removal because there was a connection between the defendant's acts "under asserted official authority" and the civil action brought against him. *Id.* at 1427-28 (internal quotation marks omitted). The Eleventh Circuit deemed it crucial that the defendant had acted "in his capacity as an agent of the FAA" with respect to all claims alleged against him in the complaint. *Id.* at 1428.[5] Underscoring the divide in the circuits, the Eleventh Circuit did not feature the issue of whether the federal government exercised comprehensive and detailed control with respect to engine inspections, but instead focused upon whether the defendant was performing the official delegated functions of the federal government. *See id.* (noting that defendant was "acting on behalf of the FAA, under the authority granted to him by the FAA").

Relatedly, federal district courts have applied variations of the official function test, holding that the conduct of a private party invoking § 1442(a)(1) must be tantamount to official governmental conduct, and that this test is not satisfied by showing merely that the private actor complied with the law. In *Brown & Williamson Tobacco Corp. v. Wigand*, 913 F. Supp. 530 (W.D. Ky. 1996), for example, the court denied removal to a defendant testify-

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as federal officers. *See Reiser v. Fitzmaurice*, No. 94 Civ. 7512, 1996 WL 54326, at *4-*5 (S.D.N.Y. Feb. 8, 1996).

[5] *But cf. Lovell Mfg. v. Export-Import Bank of the United States*, 843 F.2d 725, 734 n.13 (3d Cir. 1988) ("it is not at all clear that a mere agency-principal relationship between [a government agency] and [a private corporation] would be sufficient to support jurisdiction" under § 1442(a)(1)).

ing pursuant to a subpoena, reasoning that he was not acting under a federal officer because he "ha[d] not been directed to perform *official functions* as an officer or agent of the government." *Id.* at 533 (emphasis added). Contrary to the framework employed by the Eighth Circuit, the court explained that testifying before a grand jury is "something private citizens are regularly required to do" and "such testimony does not make a citizen a federal official or agent." *Id.*[6]

In short, under the official function approach taken by the First, Seventh, and Eleventh Circuits, Philip Morris – a private corporation doing no more than complying with federal law – would not have been entitled to removal.

2. The approach of the Eighth and Fifth Circuits rests on the comprehensiveness and detail of federal control

The Eighth Circuit's framework tracks an approach taken by the Fifth Circuit in making the comprehensive-

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[6] *See also Freiberg v. Swinerton & Walberg Prop. Servs., Inc.*, 245 F. Supp. 2d 1144, 1150 (D. Colo. 2002) ("Because [§ 1442(a)(1)] is premised on the protection of *federal* activity and an anachronistic mistrust of state courts' ability to protect and enforce *federal* interests and immunities from suit, private actors seeking to benefit from its provisions bear a special burden of establishing the official nature of their activities."); *Bakalis v. Crossland Sav. Bank*, 781 F. Supp. 140, 145 (E.D.N.Y. 1991) (bank was not "acting under" federal officer based on federal regulation because removal is permitted only "when the corporation is so intimately involved with government functions as to occupy essentially the position of an employee of the government"); *Kaplansky v. Associated YM-YWHA's of Greater New York, Inc.*, No. 88 CV 1292, 1989 WL 29938, at *3 (E.D.N.Y. Mar. 27, 1989) (parties complying with subpoena were not "acting under" federal officer because defendants were not "asked to stand in the shoes of [federal] officers or agents and perform 'official' functions"); *Northern Colorado Water Conservancy Dist. v. Board of County Comm'rs*, 482 F. Supp. 1115, 1118 (D. Colo. 1980) (county and regional council were not "acting under" federal officer in participating in Clean Water Act program because, although "the federal clean water program provides for the use of various agencies of state and local government in pursuing environmental goals, it does not constitute a grant of substantive powers to political subdivisions of another sovereign").

ness and detail of control exercised by a federal officer both necessary and sufficient to permit removal by a private party under § 1442(a)(1).

In *Winters*, the Fifth Circuit invoked the principle that § 1442(a)(1) should be interpreted liberally, and held that a chemical manufacturer sued for harm allegedly caused by Agent Orange was entitled to remove a case because of the federal government's "strict control" and "on-going supervision" of the Agent Orange production process, as well as its "detailed and direct orders . . . to supply a certain product." 149 F.3d at 398-400 (internal quotation marks omitted); *see also Miller v. Diamond Shamrock Co.*, 275 F.3d 414, 417-18 (5th Cir. 2001) (reading *Winters* as applying a "strict control" test). Numerous federal district courts in a variety of other circuits have followed the Fifth Circuit or applied similar control tests, none of which asks whether a private party is performing an official function in enforcing federal law, as does the test of the First, Seventh, and Eleventh Circuits.[7]

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[7] *See, e.g., Parks v. Guidant Corp.*, 402 F. Supp. 2d 964, 967 (N.D. Ind. 2005) (removing party must show conduct is "linked to detailed and specific regulations"); *Kaye v. Southwest Airlines Co.*, No. Civ. A. 3:05CV0450-D, 2005 WL 2074327, at *4 (N.D. Tex. Aug. 29, 2005) (Southwest Airlines not entitled to remove claims relating to failure to refund passenger charge because, "[a]lthough [the regulations] demonstrate that Southwest was compelled to take certain actions concerning" the charge, Southwest did not establish, under *Winters*, "the *detailed* control necessary for a private party to avail itself of removal"); *Edwards v. Blue Cross/Blue Shield of Texas*, No. Civ. 3:05CV0144-H, 2005 WL 1240577, at *4 (N.D. Tex. May 25, 2005) ("acting under" test not satisfied because company did not take challenged acts "pursuant to the direct and detailed control of an officer of the United States"); *Kennedy v. Health Options, Inc.*, 329 F. Supp. 2d 1314, 1318 (S.D. Fla. 2004) (contractual relationship "does not in itself constitute the direct and detailed control that is required to assert federal jurisdiction"); *In re Wireless Telephone Radio Frequency Emissions Prods. Liab. Litig.*, 327 F. Supp. 2d 554, 562-63 (D. Md. 2004) (applying "direct and detailed" federal control test); *In re 'Agent Orange' Prod. Liab. Litig.*, 304 F. Supp. 2d 442, 447 (E.D.N.Y. 2004) ("acting under" clause is satisfied by showing "substantial degree of direct and detailed federal control"); *Haller v. Kaiser Found. Health Plan of the Northwest*, 184 F. Supp. 2d

Moreover, a court in the Second Circuit applying a comprehensive and detailed control test has allowed federal officer removal on the basis of regulated corporations' compliance with federal environmental regulations. That ruling suggests the unbounded nature of a test based only upon the comprehensiveness and detail of federal control. *See In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 342 F. Supp. 2d 147, 156 (S.D.N.Y. 2004) (defendants had "sufficiently alleged that they added MTBE to gasoline at the direction of the [Environmental Protection Agency ("EPA")], a federal agency, thereby meeting the ["acting under"] requirement of removal pursuant to section 1442(a)(1)"), *clarified on other grounds*, 341 F. Supp. 2d 386 (S.D.N.Y. 2004).[8]

1040, 1044 (D. Or. 2001) (private individuals may be "acting under" federal officer when the officer has "direct and detailed control over the defendant") (internal quotation marks omitted); *Guillory v. Ree's Contract Serv., Inc.*, 872 F. Supp. 344, 346-47 (S.D. Miss. 1994) (generalized rules not sufficient to establish direct and detailed control); *Fung v. Abex Corp.*, 816 F. Supp. 569, 572-73 (N.D. Cal. 1992) ("acting under" clause satisfied because Navy monitored contract performance "at all times" and exercised "direct and detailed" control over contractor) (internal quotation marks omitted).

[8] Even district courts applying a variation of the comprehensive and detailed control test have found, in similar circumstances, that Philip Morris is not entitled to removal. *See Paldrmic v. Altria Corporate Servs., Inc.*, 327 F. Supp. 2d 959, 966 (E.D. Wis. 2004) ("acting under" clause is satisfied when a defendant establishes "direct and detailed control," but that standard was not satisfied because Philip Morris was sued "primarily" for "the manner in which it designed and manufactured light cigarettes, which actions were not taken pursuant to FTC direction"); *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 845, 846 (N.D. W. Va. 2004) (although private actor can claim protection of § 1442(a)(1) when "it is threatened with liability for actions taken on behalf of a federal officer," FTC did not require Philip Morris to employ testing method or to "disseminate misleading information"); *Pearson v. Philip Morris USA, Inc.*, No. 03-CV-178-HA, 2003 U.S. Dist. LEXIS 24508, at *11-*12 (D. Or. Aug. 8, 2003) (following *Tremblay*); *Tremblay v. Philip Morris, Inc.*, 231 F. Supp. 2d 411, 419 (D.N.H. 2002) (removal inappropriate because plaintiffs did not "challenge the enforcement or wisdom of any FTC policy, procedure or regulation" but rather the "conduct of a private corporation, acting without direction from a

3. The Ninth and Tenth Circuits construe the "acting under" clause to permit removal if the federal officer had general supervision over a private actor

Differing from the comprehensive and detailed control test adopted by the Eighth and Fifth Circuits and contrary to the official function test embraced by the First, Seventh, and Eleventh Circuits, the Ninth and Tenth Circuits have construed the "acting under" clause more broadly, requiring only that a federal officer have had general supervision over the defendant.

In *California v. H&H Ship Service Co.*, No. 94-10182, 1995 WL 619293 (9th Cir. Oct. 17, 1995) (judgment noted at 68 F.3d 481), the Ninth Circuit held that companies cleaning up a hazardous waste spill under the auspices of a remediation plan approved by the Coast Guard were "acting under" a federal officer. Specifically, the defendants argued that removal was appropriate because "their actions were taken as part of a removal action *supervised* by the United States Coast Guard." *Id.* at *1 (emphasis added). Although noting that the question was "difficult," the Ninth Circuit reasoned that the defendants were acting under a federal officer because the Coast Guard had a general "on-scene command over the removal" of the hazardous waste and "the defendants were present at the site in order to execute a removal that was under the direction and control of a federal officer." *Id.* at *1-*2. Notably, the court analyzed neither the comprehensiveness nor the detail of the Coast Guard's on-scene command or

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federal officer or agency"); *see also City of Livingston v. Dow Chem. Co.*, No. C05-03262-JSW, 2005 WL 2463916, at *3 (N.D. Cal. Oct. 5, 2005) (Dow Chemical *not* entitled to removal because "merely being subject to federal regulations, even if extensive, is insufficient to demonstrate that a private litigant acted under the direction of a federal officer") (internal quotation marks omitted). By contrast, the District Court for the Southern District of Illinois, expressly following the reasoning of *Watson*, permitted Philip Morris to remove. *See Kelly v. Martin & Bayley, Inc.*, No. 05-CV-0409-DRH, 2006 WL 44183, at *3-*4 (S.D. Ill. Jan. 9, 2006). The Seventh Circuit has accepted interlocutory review of that issue. *See* Order, *In re Kelly*, No. 06-8007 (7th Cir. Mar. 6, 2006).

control. Nor did it assess whether the private actors were performing an official governmental function. Federal district courts have sometimes taken a broad analytic approach.[9]

Similarly, the Tenth Circuit, in *Greene v. Citigroup Inc.*, No. 99-1030, 2000 WL 647190 (10th Cir. May 19, 2000) (judgment noted at 215 F.3d 1336), held that a private company was "acting under" a federal officer in engaging in the remediation of a hazardous waste site. In so holding, the court of appeals, without assessing the comprehensiveness or detail of federal control or whether the remediation was an official governmental function, explained only that the company "implemented a remedy selected by the EPA, pursuant to CERCLA, and it was subject to civil penalties for failure to comply with that directive." *Id.* at *2.

In sum, there is deep confusion in and a mature split among the courts of appeals with respect to the proper interpretation of the "acting under" clause. That confusion is consequential. The phrase distinguishes private parties from government officials, and thus acts as a key limitation of the jurisdictional statute. But, owing to a dizzying array of doctrinal formulations, the outcome of a removal decision pertaining to a private regulated actor will depend upon the circuit – or even the district – in which removal is sought. In order to bring consistency and clarity to this important area of jurisdictional law, this Court should grant certiorari.[10]

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[9] *See Crocker v. Borden, Inc.*, 852 F. Supp. 1322, 1326 (E.D. La. 1994) ("acting under" test was met merely because private corporation was "acting under the direction of the Navy in the construction of the marine turbines"); *Pack v. AC & S, Inc.*, 838 F. Supp. 1099, 1103 (D. Md. 1993) ("acting under" requirement satisfied by "direct control," which is "established by showing strong government intervention and the possibility that a defendant will be sued in state court as a result of the federal control").

[10] Adding to the doctrinal confusion, the Fifth Circuit, as well as numerous district courts, has merged the "acting under" and "under

B. In Holding That Philip Morris May Avail Itself Of The Federal Officer Removal Statute, The Eighth Circuit Misinterpreted This Court's Precedents, Reaching An Outcome Inconsistent With Statutory Text And Purpose

By permitting Philip Morris to remove under the federal officer removal statute, the Eighth Circuit departed from any reasonable interpretation of § 1442(a)(1) and this Court's precedents.

1. The Eighth Circuit embraced an interpretation of "acting under" that does not accord with the statutory text viewed in light of this Court's precedents

a. The Eighth Circuit fundamentally erred in holding that the "acting under" clause was satisfied merely by showing that "the acts . . . were performed pursuant . . . to comprehensive and detailed regulations." Pet. App. 6a (internal quotation marks omitted, first ellipsis in original). The Eighth Circuit's test – which has never been endorsed by this Court – is inconsistent with § 1442(a)(1)'s text.

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color of such office" inquiries under § 1442(a)(1). *See Winters*, 149 F.3d at 398 (without undertaking independent "acting under" analysis, asking whether "government specified the composition of Agent Orange so as to supply the causal nexus between the federal officer's directions and the plaintiff's claims"); *New Jersey Dep't of Envtl. Protection v. Exxon Mobil Corp.*, 381 F. Supp. 2d 398, 404 (D.N.J. 2005) ("To establish that it was 'acting under' an officer of the United States, Defendant must show a causal nexus between the conduct charged . . . and the acts performed by Defendant at the direction of official federal authority."); *Freiberg*, 245 F. Supp. 2d at 1149 (private party may remove "as long as the private actor asserts a colorable federal defense" and "demonstrates a sufficient causal nexus between what it has done under asserted official authority and the acts giving rise to the state claims"); *Good v. Armstrong World Indus., Inc.*, 914 F. Supp. 1125, 1128 (E.D. Pa. 1996) ("The 'acting under' language in the statute forces [the defendant] to show a causal nexus between the plaintiff's claims and the conduct taken pursuant to direction from a federal officer."); *Akin v. Big Three Indus., Inc.*, 851 F. Supp. 819, 823 (E.D. Tex. 1994) (treating "acting under" limitation as a causation requirement).

The wording of § 1442(a)(1) gives good reason to believe that regulation of a private corporation, however comprehensive or detailed, cannot support removal by a private party. The statute states that a removing defendant must be sued in "an official or individual capacity for any act under color of such office," bespeaking Congress's expectation that a defendant will have been acting in an official capacity – that is, that the private actor was functionally standing in the shoes of a federal officer in carrying out the challenged acts. *Cf. Jefferson County v. Acker*, 527 U.S. 423 (1999) ("under color of office" requirement demands showing "a causal connection between the charged conduct and asserted *official authority*") (internal quotation marks omitted, emphasis added). The language adjoining the "acting under" clause thus strongly supports a reading of the clause that excludes a private actor, such as Philip Morris, that has not carried out an official governmental function. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (under "doctrine of *noscitur a sociis*," a "word is known by the company it keeps"); *Neal v. Clark*, 95 U.S. 704, 708 (1878) ("It is a familiar rule in the interpretation of . . . statutes that a passage will be best interpreted by reference to that which precedes and follows it.") (internal quotation marks omitted).

This Court's decision in *City of Greenwood v. Peacock*, 384 U.S. 808 (1966), underscores that textual point. In that case, the Court decided whether private parties could avail themselves of the civil rights removal provision of 28 U.S.C. § 1443(2), which authorizes removal for "any act under color of authority derived from any law providing for equal rights." In resolving that question, the Court looked to a predecessor statute of § 1443(2), which limited removal to "officer[s]" or "other person[s]." 384 U.S. at 816. The Court concluded that the "other person" clause protected only "officers and agents" of the Freedmen's Bureau charged with enforcing the Civil Rights Act of 1866. *Id.* at 816-17. The Court explained that those agents derived their authority from the Freedmen's

Bureau legislation and were entitled to removal, if not as officers, then "based upon their enforcement activities under the Freedmen's Bureau legislation and the Civil Rights Act." *Id.* at 818. Although interpreting § 1443(2), the Court held that the "other person" clause of that provision tracked the "acting under" clause of a predecessor to § 1442(a)(1). *Id.* at 820 n.17, 823 n.20; *see also id.* at 820 n.17 ("The limitation of 28 U.S.C. § 1443(2) to official enforcement activity . . . draws support from analogous provisions in the removal statutes available to federal revenue officers.").

Thus, *Peacock* supports the proposition that the "acting under" clause of § 1442(a)(1) should encompass only "federal officers or agents and those authorized to act with or for them in affirmatively executing duties under . . . federal law." *Id.* at 824. The Eighth Circuit's framework – which looks to whether a private party is subject to comprehensive and detailed control – is inconsistent with that teaching, as it confuses those private parties authorized to *enforce* federal law (such as a private party imbued with authority to enforce the Civil Rights Act) with those that *comply* with federal law (such as Philip Morris in marketing light cigarettes).

b. The court below also erred in thinking that it should give a "broad" interpretation to the "acting under" clause. Ordinarily, statutes affording removal jurisdiction are strictly construed, a corollary of the principle that federal courts are courts of limited jurisdiction. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). The court of appeals rested on this Court's decision in *Willingham*, however, to interpret the statute broadly in deciding that Philip Morris was "acting under" a federal officer. *See* Pet. App. 4a-5a.

The Eighth Circuit's reliance on *Willingham* was entirely misplaced. In *Willingham*, this Court rejected the view that doubt as to whether a federal officer could claim official immunity rendered removal improper, explaining that, "[a]t the very least," the statute "is broad enough to

cover all cases where *federal officers* can raise a colorable defense arising out of their *duty to enforce federal law*." 395 U.S. at 406 (emphases added). Properly construed, the upshot of *Willingham* is that the removal by a federal officer sued based on the performance of official duties should not be frustrated by a narrow interpretation of § 1442(a)(1). That principle has no bearing in a context, such as this, where the very question to be answered is whether a defendant stands in the shoes of a federal officer.[11] Indeed, in analogous circumstances in which the scope of the statute has been at issue, this Court has adopted narrowing constructions of § 1442(a)(1). *See International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 81-82 (1991) (rejecting defendant agency's broad interpretation of "officer of the United States"); *see also Mesa v. California*, 489 U.S. 121, 132-35 (1989) (removal requires the "averment of a federal defense").

2. The Eighth Circuit's control test is inconsistent with the purpose of § 1442(a)(1)

The distinction between being authorized to enforce federal law and complying with federal law explains why a comprehensive and detailed control test, which treats a private actor doing no more than complying with regulation in engaging in commercial activity as a federal officer, is flatly inconsistent with the purpose of § 1442(a)(1). This Court has frequently looked to the history and purpose of the statute in resolving interpretive disputes about the statute's scope. *See Arizona v. Manypenny*, 451 U.S. 232, 241-42 (1981); *Willingham*, 395 U.S. at 405-06; *Gay v. Ruff*, 292 U.S. 25, 32-33 (1934); *Colorado v. Symes*, 286 U.S. 510, 517-19 (1932). The purpose, this Court has said, "is not hard to discern." *Willingham*, 395 U.S. at

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[11] *See Freiberg*, 245 F. Supp. 2d at 1152 n.6 ("Given the purpose of § 1442 and its basis in a mistrust of states and state courts to protect federal interests, [the statute] should be read expansively only when the immunity of individual federal officials, and not government contractors, is at issue.").

406. The statute rests on the premise that "the Federal Government 'can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, . . . the operations of the general government may at any time be arrested at the will of one of its members.'" *Id.* (quoting *Tennessee v. Davis*, 100 U.S. 257, 263 (1880)).[12] Expanding the federal officer removal statute to encompass a private corporation doing business in compliance with federal regulation does not honor that purpose.[13]

Furthermore, because Philip Morris is complying with rather than enforcing federal law in marketing light cigarettes, Philip Morris faces no plausible risk that state court animus against the enforcement of federal law – a key historical rationale for removal – will be directed against it. *See Manypenny*, 451 U.S. at 241-42 ("Historically, removal under § 1442(a)(1) and its predecessor statutes was meant to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties. The act of removal permits a trial upon the merits of the state-law question free from local interests or prejudice.") (footnote omitted); *Ruff*, 292 U.S. at 32 (Force Act removal provision was designed to

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[12] *See Willingham*, 395 U.S. at 406 (federal officer removal statute rests upon "very basic interest in the enforcement of federal law through federal officials"); *see also* Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 3727, at 125 (3d ed. 1998) (§ 1442 authorized removal by those "who are acting in the course of their employment *by or on behalf of* the United States") (emphasis added); *Symes*, 286 U.S. at 517 (federal officer removal statutes were enacted to "safeguard[] officers and others acting under federal authority against peril of punishment for violation of state law . . . by reason of opposing policy on the part of those exerting or controlling state power").

[13] *See United States v. Philip Morris Inc.*, 263 F. Supp. 2d 72, 81 (D.D.C. 2003) ("The specific advertisements which the Government claims were intentionally misleading . . . were certainly not mandated by the FTC.").

quell South Carolina's threat of nullification by "protect[ing] those engaged in the enforcement of the federal revenue law from attack by means of prosecutions and suits in a state court for violation of state law").

Nor does the Eighth Circuit's comprehensive and detailed control test find support in other, secondary, purposes of § 1442(a)(1). This Court has explained, for example, that "one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court." *Willingham*, 395 U.S. at 407; *see also International Primate Protection League*, 500 U.S. at 86-87 (one justification for § 1442(a)(1) is that federal officers need protection of a federal forum "because of the manipulable complexities involved in determining [federal officers'] immunity"). The Eighth Circuit, however, made no mention of that purpose, which weighs heavily against an interpretation of § 1442(a)(1) that includes a private actor, such as Philip Morris, with no claim whatsoever to official immunity.[14]

3. The federal government's suit against Philip Morris for acts similar to those at issue here underscores the consequence of the distinction between private actors and federal officers

One of the great paradoxes of the Eighth Circuit's ruling is that the federal government is currently locked in a lengthy legal dispute with several tobacco companies, including Philip Morris, over their non-compliance with federal law. Indeed, the very acts that Philip Morris alleges were required by the federal government to qualify it for "federal officer" removal purposes are the very same acts that the federal government alleges constituted a RICO conspiracy in which Philip Morris, and other conspirators,

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[14] *See Richardson v. McKnight*, 521 U.S. 399, 404-10 (1997) (privately employed prison guards of for-profit corporation running state correctional center not entitled to qualified immunity because "[h]istory does *not* reveal a 'firmly rooted' tradition of immunity" for prison guards and immunity would not serve purposes of the doctrine).

"did the exact opposite of what the Government and public health community called for" and "fraudulently exploited the FTC test method to target and benefit financially by deceiving smokers." Post-Trial Br. of the United States of America at 70-71, *United States v. Philip Morris USA Inc.*, No. 99-CV-02496 (D.D.C. filed Aug. 24, 2005). In fact, the federal government itself has taken the position that the Eighth Circuit's decision in this case was in grave error by pointing out that "[e]very other court to consider Philip Morris's claim for removal under [§ 1442(a)(1)] has rejected it." Reply Mem. in Support of the Post-Trial Br. of the United States of America at 28 n.31, *United States v. Philip Morris USA Inc.*, No. 99-CV-02496 (D.D.C. filed Sept. 19, 2005) ("U.S. Reply Mem.") (discussing *Watson*).

The government's suit against Philip Morris therefore brings into high relief the common sense difference between a private commercial actor allegedly complying with regulation and a federal officer performing official duties, a difference that the Eighth Circuit's approach to federal officer removal entirely elides.

4. The Eighth Circuit's approach conflates ordinary preemption analysis with the justification for federal officer removal

Underlying the Eighth Circuit's badly mistaken decision is the court's apparent confusion between the requisites for preemption of state law and the standards and justifications for federal officer removal. The court of appeals explained, for example, that "[w]hether Philip Morris's labeling of cigarettes as 'lights' is deceptive directly implicates the enforcement and wisdom of the FTC's tobacco policies." Pet. App. 15a. But it is the law of preemption, not federal officer removal, that safeguards federal interests in carrying out regulatory objectives vis-à-vis regulated parties. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (reconciling, under preemption principles, various state common law damage actions with federal regulation of cigarettes). A necessary premise of

the Eighth Circuit's holding, therefore, is that Congress, through § 1442(a)(1), decided that state courts are not competent to hear preemption defenses raised by private regulated parties.

This Court has squarely rejected that premise in two ways. First, "a case may *not* be removed to federal court on the basis of a federal defense, *including the defense of pre-emption*, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) (second emphasis added). And, second, "when a state proceeding presents a . . . pre-emption issue, the proper course is to seek resolution of that issue by the state court," as state courts are "presumed competent to resolve federal issues." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988).

In sum, the Eighth Circuit erred in adopting a framework in which "[t]he applicability of [the federal officer] removal statute depend[ed] in large part on the role the FTC plays in regulating the tobacco industry." Pet. App. 2a. By asking a fundamentally misguided question, the Eighth Circuit arrived, predictably, at the wrong answer – a result incompatible with this Court's precedents and out of keeping with any reasonable rendition of § 1442(a)(1). A private regulated corporation doing no more than abiding by federal regulation cannot avail itself of the protection of the federal officer removal statute.

C. This Case Presents An Excellent Vehicle To Resolve The Issues Presented

This case is a particularly suitable vehicle for this Court to bring needed clarity to the law of federal officer removal. The district court certified the issue of whether Philip Morris was entitled to federal officer removal pursuant to 28 U.S.C. § 1292(b), finding that its ruling "involve[d] a controlling question of law" and that there was a "substantial ground for difference of opinion" on that issue. *See* Pet. App. 57a; *see also id.* at 58a ("The facts

surrounding the FTC's involvement with cigarette testing and advertising are not in dispute. This question is purely a legal one."). The legal errors committed by the Eighth Circuit pertained to important jurisdictional issues that are wholly separate from the merits of petitioners' claims and that can be resolved as questions of law. Furthermore, it is common ground that Philip Morris is an entirely private corporation and that Philip Morris was not performing an official governmental function in abiding by FTC regulations. And Philip Morris has acknowledged that "[t]he facts relating to the history of the FTC's regulation . . . are not in dispute." Appellee's Br. 8. This Court will accordingly have the opportunity to fashion a framework for federal officer removal unhampered by an incomplete record or by equivocal or disputed facts.

The interlocutory character of the court of appeals' decision does not at all weigh against this Court's review. Where, as here, "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Robert L. Stern, *et al.*, *Supreme Court Practice* 259 (8th ed. 2002). As we set forth above, those conditions are unarguably satisfied in this case. Indeed, this Court has granted certiorari in order to review similar decisions certified under 28 U.S.C. § 1292(b) on many recent occasions. *See, e.g.*, *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005); *Norfolk Southern Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004).

D. The Eighth Circuit's Decision Raises Jurisdictional Issues Of Exceptional Importance

Because § 1442(a)(1) regulates an exceptionally important intersection of the interest of States in the enforcement of their own laws in their own forums and the interest of the federal government in the supremacy of federal law, this Court has long recognized the importance of maintaining legal clarity in the test for federal officer removal. *See Symes*, 286 U.S. at 518 (federal officer

removal statute reflects important "equality" of interests of States and federal government). Indeed, issues pertaining to the removal statute, this Court has said, are "of great importance, bringing . . . into consideration the relation of the general government to the government of the States." *Davis*, 100 U.S. at 260; *see also id.* at 273 (Clifford, J., dissenting) ("[q]uestions of greater importance than those certified . . . could hardly be presented for discussion"); *Manypenny*, 451 U.S. at 239 (certiorari was granted to resolve issue of jurisdiction arising from § 1442(a)(1) "[b]ecause it is an issue that carries significance for federal-state relations").

In other contexts, this Court has zealously protected States' interest in enforcing both state and federal law in state courts. *See, e.g., Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (state courts have concurrent jurisdiction over civil RICO claims because under "system of dual sovereignty . . . state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States"). The need for such protection is even greater in this type of case, in which a statutory removal provision is used to wrest an action based on state law from state court. *See Shamrock Oil*, 313 U.S. at 109 ("Due regard for the rightful independence of state governments, which should actuate federal courts, requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined.") (internal quotation marks omitted).

The Eighth Circuit's reasoning will, predictably, invite regulated entities of all types to assert that they, too, have a statutory right not to be sued under state law in state court. In concurrence, Judge Gruender, recognizing the expansiveness of the Eighth Circuit's framework, attempted to restrict the holding, suggesting that, because the FTC's regulation of Philip Morris was "extraordinary," the decision should not be "an invitation to every participant in a heavily regulated industry to claim that it . . . acts at the direction of a federal officer merely because it

tests or markets it products in accord with federal regulation." Pet. App. 18a. Judge Gruender's effort at damage limitation, however, is deeply flawed. It rests on a mistaken appraisal of FTC regulation and misunderstands the comprehensiveness and detail of other federal regulatory regimes.[15]

FTC regulation of light cigarettes is anything but extraordinary. It is undisputed that the FTC has regulated neither the design nor the manufacturing of light cigarettes. Nor has the FTC required that tobacco companies advertise their cigarettes as "light" or "low tar." In fact, the FTC has never even defined those significant terms. *See* Notice, *Cigarette Testing; Request for Public Comment*, 62 Fed. Reg. 48,158, 48,163 (1997) (observing that there are no "official definitions" for cigarette descriptors such as "low tar" and "light"). Indeed, this Court has expressly recognized statutory limitations on the FTC's regulatory authority over cigarettes. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 149-50 (2000). It is thus hardly surprising that the federal government submitted evidence in its suit against Philip Morris squarely "reject[ing] [Philip Morris's] claim that the FTC has given special focus to cigarette advertising." U.S. Reply Mem. at 29.[16]

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[15] In addition to being a party "acting under" a federal officer, a removing party must also be sued for an "act under color of such office." 28 U.S.C. § 1442(a)(1). Under *Willingham*, however, the "under color of office" limitation is satisfied merely by an allegation that the party was acting in an official capacity in performing the charged conduct. *See* 395 U.S. at 409. Thus, once a private actor is judged to be acting under a federal officer by the Eighth Circuit's control test, it will be easy to maintain that the challenged acts were under color of office. It is therefore imperative that this Court provide guidance on the proper interpretation of the "acting under" clause.

[16] The majority opinion also found it significant that the FTC's "actually conduct[ing] the testing [of cigarettes] itself for over twenty years, instead of delegating that task to the industry, was outside the government's normal course of conduct." Pet. App. 13a. But the court of appeals offered no explanation – and none is apparent – for why that fact is at all relevant to judging whether governmental regulation is

Indeed, federal regulation in other regulatory contexts is *at least* as comprehensive and detailed as is the FTC's regulation of light cigarettes.[17] The National Highway Traffic Safety Administration ("NHTSA"), for example, has long broadly regulated automobile safety measures, including mandating detailed specifications for crash tests. *See Public Citizen, Inc. v. NHTSA*, 374 F.3d 1251, 1253-57 (D.C. Cir. 2004) (detailing NHTSA regulation of automobile airbag regulations, including testing procedures); *see also Geier v. American Honda Motor Co.*, 529 U.S. 861, 874-81 (2000) (describing history of federal regulation of passive restraints). Federal regulation of other consumer products, such as pesticides, medical devices and drugs, and recreational boats, is similarly expansive and detailed. *See, e.g., Bates v. Dow AgroSciences LLC*, 125 S. Ct. 1788, 1794-97 (2005) (detailing broad federal regulation of pesticide labeling, packaging, and

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comprehensive or detailed. Thus, it offers no logical basis, under the court's own test, upon which to distinguish between regulation by the FTC and regulation by other federal agencies.

[17] *See Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 966 (9th Cir. 2005) ("[Office of the Comptroller of the Currency] regulations [of national bank subsidiaries] establish a comprehensive and finely calibrated scheme for the creation of operating subsidiaries."); *Taylor v. Progress Energy, Inc.*, 415 F.3d 364, 369 (4th Cir. 2005) (Secretary of Labor has "promulgated comprehensive regulations" of employers under Family and Medical Leave Act of 1993); *Chapman v. Lab One*, 390 F.3d 620, 624 (8th Cir. 2004) ("Congress specifically required the Secretary of Transportation to develop comprehensive regulations regarding controlled substance testing and laboratory procedures" for mandatory drug testing in railroad industry); *Waymire v. Norfolk & Western Ry. Co.*, 218 F.3d 773, 775 (7th Cir. 2000) (Secretary of Transportation is authorized "to implement comprehensive and detailed railroad safety regulations"); *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 369 (3d Cir. 1999) ("[T]he Administrator of the FAA has implemented a comprehensive system of rules and regulations, which promotes flight safety by regulating pilot certification, pilot pre-flight duties, pilot flight responsibilities, and flight rules.") (footnotes omitted); *Swirsky v. National Ass'n of Sec. Dealers*, 124 F.3d 59, 61 (1st Cir. 1997) ("The Securities Exchange Act of 1934 and its subsequent amendments create a detailed, comprehensive system of federal regulation of the securities industry.").

distribution); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 476-80 (1996) (describing comprehensive federal regulation of distribution of medical devices); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56-59 (2002) (detailing comprehensive federal regulation of recreational boats). Yet, in each of those latter circumstances, the federal regulation is not so "comprehensive" as to preempt state-law claims, much less to support federal officer removal.

Given that the system of voluntary regulation underlying Philip Morris's claimed entitlement to removal is less formal and certainly no more comprehensive or detailed than many other federal regulatory regimes, there is no reasonable prospect that the damage from the Eighth Circuit's rule can be contained. The wave of removals sure to follow in the wake of the Eighth Circuit's decision thus calls for intervention by this Court. Apart from divesting States of the ability to enforce state laws in their own forums against private companies alleged to have harmed their citizens, a wave of removals will severely, and unnecessarily, tax the resources of the federal judiciary. *Cf. City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76-77 (1941) (federal diversity statute is strictly construed to avoid "offense to state sensitiveness" and to "reliev[e] the federal courts of the overwhelming burden of business that intrinsically belongs to the state courts") (internal quotation marks omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEVEN EUGENE CAULEY
MARCUS N. BOZEMAN
CAULEY, BOWMAN, CARNEY
& WILLIAMS, PLLC
11311 Arcade Drive
Suite 200
Little Rock, Arkansas 72212
(501) 312-8500

DAVID C. FREDERICK
Counsel of Record
KELLY P. DUNBAR
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Petitioners

April 7, 2006

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-1225

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION, AND PHILIP MORRIS, INCORPORATED, A CORPORATION,
Defendants-Appellees.

[Submitted Nov. 15, 2004]

[Filed Aug. 25, 2005]

Before RILEY, JOHN R. GIBSON, and GRUENDER, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Lisa Watson and Loretta Lawson filed this interlocutory appeal, on their own behalf and as representatives of a class, from the district court's[1] denial of their motion to remand to state court. Watson and Lawson filed their class action in Arkansas state court, alleging that Philip Morris violated the Arkansas Deceptive Trade Practices Act. *See* Ark.Code Ann. § 4-88-107 *et seq*. We hold that the case was properly removed to federal court.

Watson and Lawson claim that Philip Morris engaged in "unfair business practices and/or deceptive and unlawful conduct in connection with the manufacture, distribu-

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[1] The Honorable G. Thomas Eisele, United States District Judge for the Eastern District of Arkansas.

tion, promotion, marketing, and sale of Cambridge Lights and Marlboro Lights." They basically allege that Philip Morris designed its cigarettes to deliver more tar and nicotine to smokers than its use of the labels "lights" and "lowered tar and nicotine" in its advertising would suggest. The propriety of remand is the only issue before us, as it was in the district court, and we express no views on the merits.

Philip Morris removed the action pursuant to 28 U.S.C. § 1442(a)(1) (2000), which permits removal where a person is sued for actions taken under the direction of a federal officer. Philip Morris claims it satisfies the requirements of the federal officer statute because it was acting under the direct control of the Federal Trade Commission (FTC) when it engaged in the allegedly unlawful conduct. The district court denied Watson's and Lawson's motion to remand and certified the following question for interlocutory appeal under 28 U.S.C. § 1292(b): "May Philip Morris remove this lawsuit to federal court under 28 U.S.C. § 1442(a)?" Slip op. at 36. We affirm the district court's answer of "yes" to that question.

The applicability of this removal statute depends in large part on the role the FTC plays in regulating the tobacco industry.[2]

The Federal Trade Commission Act authorizes the FTC to regulate "unfair methods of competition" and "unfair or deceptive acts or practices in or affecting commerce," 15 U.S.C. § 45(a)(2) (2000), which includes regulation of unfair and deceptive tobacco advertisements. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 513, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (FTC has "long regulated unfair and deceptive advertising practices in the cigarette industry").

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[2] *See Federal Trade Comm'n v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37-38 (D.C.Cir.1985), for a comprehensive history of the FTC's involvement in regulating unfair and deceptive advertising in the tobacco industry.

In the 1950s, the FTC's policy changed from permitting some claims of "low" or "lower" tar and nicotine levels to prohibiting all such representations in advertising. The FTC wanted a uniform rating system so that consumers could compare tar and nicotine levels among brands. The FTC developed the Cambridge Filter Method, which uses a smoking machine that takes a two-second puff on a cigarette every sixty seconds until the cigarette is smoked to a specified length. *Brown & Williamson*, 778 F.2d at 37. The machine collects tar and nicotine on filter pads to be measured. Since its first formal testing in 1967, the FTC has been reporting the Cambridge Filter Method results in the Federal Register. From its initial development, the FTC was aware that the testing method did not measure the amount of tar or nicotine that an individual smoker may receive. The purpose of the test was not to replicate human smoking but to provide a basis for comparison.

When the FTC proposed a trade regulation rule in 1970 that would require advertisements to disclose tar and nicotine ratings, as determined by the Cambridge Filter Method, several leading tobacco companies responded by entering into an agreement to disclose the Cambridge Filter Method results in all cigarette advertising. The FTC accepted the agreement, which was conditioned on suspension of the formal rulemaking proceedings. Letter from Eight Tobacco Companies to FTC (Dec. 17, 1970) ("Letter Agreement").

After twenty years of testing, the FTC decided to terminate its cigarette testing lab, and instead require the cigarette industry to self-test, using the Cambridge Filter Method, and to submit results that would continue to be published in the Federal Register. The FTC retained the right to conduct unannounced inspections of the industry testing facilities and the right to confirm the test results through a government lab.

Based upon the FTC's involvement in the tobacco industry, the district court denied Watson's and Lawson's mo-

tion to remand to state court. Our review of that denial is de novo. *See Nichols v. Harbor Venture, Inc.*, 284 F.3d 857, 860 (8th Cir.2002).

Section 1442(a)(1) permits removal by the following:

> (1) The United States or any agency thereof or any officer (*or any person acting under that officer*) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(emphasis added). Section 1442(a) requires that a defendant: (1) act under the direction of a federal officer; (2) show a nexus or "causal connection" between the alleged conduct and the official authority; (3) have a colorable federal defense; and (4) be a "person" within the meaning of the statute. *See, e.g., Jefferson County v. Acker*, 527 U.S. 423, 431, 119 S.Ct. 2069, 144 L.Ed.2d 408 (1999) (requiring a "colorable federal defense" to a suit for "a[n] act under color of office" and "a 'causal connection' between the charged conduct and asserted official authority"); *Mesa v. California*, 489 U.S. 121, 125, 109 S.Ct. 959, 103 L.Ed.2d 99 (1989) (recognizing the 1442(a) requirement of "'person[s] acting under' an officer of the United States or any agency thereof" sued "for act[s] under color of such office"); *United States v. Todd*, 245 F.3d 691, 693 (8th Cir.2001) (requiring "a 'colorable defense arising out of [the defendant's] duty to enforce federal law'"); *Paldrmic v. Altria Corp. Servs., Inc.*, 327 F.Supp.2d 959, 964 (E.D.Wis.2004) (incorporating all four requirements). Watson and Lawson dispute only the first and second requirements.

In *Willingham v. Morgan*, 395 U.S. 402, 406-07, 89 S.Ct. 1813, 23 L.Ed.2d 396 (1969), the Supreme Court explained why the federal officer removal statute was not meant to be given a "narrow" or "limited" interpretation:

> One of the primary purposes of the removal statute – as its history clearly demonstrates-was to have such defenses litigated in the federal courts. . . . In cases like this one, Congress has decided that federal offices, and indeed the Federal Government itself, require the protection of a federal forum. This policy should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1).

The primary purpose of giving the protection of a federal forum under this statute has a lengthy history. The broad scope of federal officer removal is explained in the early case of *Tennessee v. Davis*, 100 U.S. 257, 263, 25 L.Ed. 648 (1879), where the Court applied the original version of the statute to revenue officers:

> [I]f their protection must be left to the action of the State court, the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the State court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.

See also Arizona v. Manypenny, 451 U.S. 232, 243, 101 S.Ct. 1657, 68 L.Ed.2d 58 (1981) ("Respondent here, by obtaining a federal forum, has fully vindicated the federal policies supporting removal. The plainest evidence of this vindication is the District Court's application of the immunity defense."); *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 397-98 (5th Cir.1998). The Supreme Court interpreted the original version of the statute to ex-

clude agencies' removal ability under the statute. *Primate Protection League v. Admin'rs. of Tulane Educ. Fund*, 500 U.S. 72, 87, 111 S.Ct. 1700, 114 L.Ed.2d 134 (1991). Congress responded by amending the statute to explicitly permit agency removal. *See* Pub.L. 104-317, § 206(a)(1) (1996). Congress's decision to amend the statute to reverse *Primate* and permit agency removal provides further support for a broad interpretation of the federal officer removal statute.

I.

Whether a defendant is "acting under" the direction of a federal officer depends on the detail and specificity of the federal direction of the defendant's activities and whether the government exercises control over the defendant.

"[R]emoval by a 'person acting under' a federal officer must be predicated upon-a showing that the acts . . . were performed pursuant to an officer's direct orders or to comprehensive and detailed regulations." *Virden v. Altria Group, Inc.*, 304 F.Supp.2d 832, 844 (N.D.W.Va.2004) (quoting *Ryan v. Dow Chem. Co.*, 781 F.Supp. 934, 947 (E.D.N.Y.1992)). Mere participation in a regulated industry is insufficient to support removal unless the challenged conduct is "closely linked to detailed and specific regulations." *Virden*, 304 F.Supp.2d at 844 (quoting *In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, 216 F.Supp.2d 474, 500 (D.Md.2002), *rev'd sub nom. on other grounds, Pinney v. Nokia, Inc.*, 402 F.3d 430 (4th Cir.2005)). In contrast to the district court's decision in this case, every other district court confronted with tobacco companies alleging they were acting under a federal officer has remanded the case to state court. *See Virden*, 304 F.Supp.2d 832; *Paldrmic v. Altria Corp. Servs.*, 327 F.Supp.2d 959 (E.D.Wis.2004); *Tremblay v. Philip Morris*, 231 F.Supp.2d 411 (D.N.H.2002).

Although tobacco companies' efforts at federal officer removal have not been successful in other courts, companies contracting with the government have had more success. Courts have found private actors, working under

government contracts, to be acting under the direction of a federal officer where the government maintained control over the manner in which the contractor performed the contracted work or monitored the performance of the work. *Virden*, 304 F.Supp.2d at 845-46.

In a Fifth Circuit government contract case, Diamond Shamrock Chemical Company manufactured herbicide, now known as Agent Orange, for the government. *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 390 (5th Cir.1998). A nurse in Vietnam claimed that exposure to Agent Orange caused her to develop lymphoma. *Id.* Diamond removed the case to federal court and argued that when it manufactured Agent Orange it was acting under the direction of a federal officer. *Id.* at 398. The government specified the formula for Agent Orange, as well as the packaging, labeling and shipping requirements. *Id.* at 399. The government also inspected the labeling of the containers, *id.*; and compelled Diamond to deliver the Agent Orange to it under threat of criminal sanctions, *id.* at 398. In finding Diamond acted under the direction of a federal officer, the court stated:

> We are convinced that the government's detailed specifications concerning the make-up, packaging, and delivery of Agent Orange, the compulsion to provide the product to the government's specifications, and the on-going supervision the government exercised over the formulation, packaging, and delivery of Agent Orange is all quite sufficient to demonstrate that the defendants acted pursuant to federal direction and that a direct causal nexus exists between the defendant's actions taken under color of federal office and Winters's claims.

Id. at 399-400.

The extent of federal direction reached a similar level in *Fung v. Abex Corp.*, 816 F.Supp. 569 (N.D.Cal. 1992). *Fung* involved exposure to asbestos during Abex's construction of submarines pursuant to federal contract. *Id.* at 570-71. The district court found that the government

monitored Abex's performance "at all times" and required it to "construct and repair the vessels" according to the contract specifications. *Id.* at 572-73. In addition, the government retained the right to inspect, test, and approve all contract supplies, and performed its own tests on the submarines to ensure compliance with the contract. *Id.* at 573. The district court found that this level of control and direction satisfied the "acting under" requirement of section 1442(a). *Id.*

Here, the FTC exercises the same type of comprehensive, detailed regulation and does the same kind of ongoing monitoring as in *Winters* and *Fung*. In addition to specifying a testing method that was discussed in detail in two separate submissions to chemists' journals, the FTC modified the testing method to include the following requirements:

> 1. Smoke cigarettes to a 23 mm. butt length, or to the length of the filter and overwrap plus 3 mm. if in excess of 23 mm.,
>
> 2. Base results on a test of 100 cigarettes per brand, or type,
>
> 3. Cigarettes to be tested will be selected on a random basis, as opposed to "weight selection,"
>
> 4. Determine particulate matter on a "dry" basis . . . to determine the moisture content,
>
> 5. Determine and report the "tar" content after subtracting moisture and alkaloids [(]as nicotine) from particulate matter,
>
> 6. Report tar content to the nearest whole milligram and nicotine content to the nearest 1/10 milligram.

Federal Trade Commission: Testing for Tar and Nicotine Content, 32 Fed.Reg. 11,178 (Aug. 1, 1967). The FTC's specificity in testing procedures is comparable to the specificity of the government's formula for Agent Orange.

Another example of the detail involved in the government's directives to the tobacco industry is the specific

manner in which the industry agreed to disclose the tar and nicotine ratings in advertising:

> The disclosure will be in the following language:
>
> ____mg. "tar", ___mg. nicotine
>
> av. per cigarette, FTC report (date)

Letter Agreement at 2. In *Fung*, the parties' agreement included the design for submarines, and in this case the parties' agreement included the design for testing cigarettes and disclosure of ratings. In *Winters*, the government controlled the delivery and labeling of Agent Orange. Here, the FTC controls the delivery of tar and nicotine information to consumers. The FTC's ongoing monitoring of the cigarette industry far exceeds the monitoring in *Winters*. The government in *Winters* monitored one small aspect of the Agent Orange creation and distribution process – the labeling of the containers. Here, the FTC itself conducted the entire testing process for twenty years and now requires the cigarette manufacturers to conduct the testing to its specifications. The FTC continues to inspect the industry labs, independently verify the results, and publish the ratings. In addition, part of the FTC's ongoing monitoring includes monitoring cigarette ads and occasionally bringing claims against companies for deceptive advertising.

We are satisfied that the level of specificity of the direction is more extensive than that in *Winters*, but the question remains whether the government compels compliance with its directions. In *Winters*, Diamond Shamrock was compelled to supply the Agent Orange to the government. In *Fung*, the defendant acted pursuant to a binding contract that gave the government legal rights to enforce its directions. In this case, Philip Morris acted pursuant to a voluntary industry agreement. Two of the courts confronted with federal officer removal and the tobacco industry have found it significant that the agreement to test and disclose ratings was a "voluntary" agreement, not a formal rule. *See, e.g., Paldrmic*, 327 F.Supp.2d at 966; *Virden*, 304 F.Supp.2d at 841-42.

We are convinced that the record in this case shows a level of compulsion that establishes that Philip Morris was indeed "acting under" the direction of a federal officer. The FTC effectively used its coercive power to cause the tobacco companies to enter the agreement. The FTC made the policy decision to pursue a voluntary agreement instead of proceeding by formal rulemaking. The tobacco industry first proposed an agreement on October 23, 1970, which was just over two months after the FTC announced an intention to make a formal rule requiring disclosure of the Cambridge Filter Method tar and nicotine ratings. This "voluntary agreement" was a substitute for a formal rule. The industry almost certainly would not have proposed the agreement if the FTC had not threatened to make a formal rule. Though the FTC did not act formally, the effect of its actions still compelled the tobacco companies to adhere to a testing and advertising standard that was prompted by the FTC. The FTC agreed with the industry that a voluntary agreement was preferable to the formalities of rulemaking.

FTC Chairperson Miles W. Kirkpatrick explained how an agreement would best serve the goals of the FTC:

> The Commission's objective is to insure that all cigarette advertising make these tar and nicotine disclosures as soon as possible. If the industry can devise a voluntary plan that is feasible and appropriate, the Commission is willing to consider it. A trade regulation rule, if contested in the courts, might take a long time to become effective; a workable, voluntary plan by the industry could be put into effect immediately.

Press Release, FTC (Oct. 1, 1970).

Daniel Oliver, Chairman of the FTC in 1987, explained that the FTC's practice in advertising regulation was moving more toward agreements and away from rulemaking, which had proved to be inefficient, "little used and not terribly successful." Bringing a single case against one cigarette company would have the effect of bringing the whole industry into compliance and would do so much

more quickly than would a formal rulemaking process. As a result, voluntary agreements have become part of a general trend in administrative law, and the tobacco industry has responded to that trend with cooperation.

Even if the companies had not been compelled to enter the agreement originally, after the companies entered the agreement, the FTC has enforced compliance with the agreement. The FTC's comments suggest it would bring an action for deceptive advertising or reinstitute formal rulemaking proceedings if a company did not disclose the tar and nicotine ratings. Though one could call the agreement voluntary, the reality is that the cigarette companies have included the Cambridge Filter Method results in their cigarette advertising for over thirty years. The main difference between a formal rule and an agreement is that the FTC enforces the disclosure of the Cambridge Filter Method's results by bringing an action against the company for deceptive advertising rather than directly enforcing a regulation.[3] Regardless of the enforcement method, the FTC has compelled the tobacco industry to advertise the tar and nicotine ratings as determined by the Cambridge Filter Method.

The FTC has made it clear it has not found any other testing method adequate and will consider advertising to be "deceptive" if it deviates from the Cambridge Filter Method. In an advisory opinion rejecting one company's offer to advertise a tar level higher than the most recent Cambridge Filter method results, the FTC explained that consumers could be confused if a company were to advertise tar levels that differed from the published Cambridge Filter Method results. *In re Lorillard*, 92 F.T.C. 1035.

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[3] "[W]e cannot force a company to use nor can we approve in advance the kind of testing a company uses. We can make sure that the testing a company uses is an accurate test, especially as that accuracy relates to the FTC method." MacLeod testimony. *See FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 44-45 (D.C.Cir.1985).

(1978). That statement, along with others,[4] sent a clear signal to the tobacco companies that they would risk a deceptive advertising claim if they failed to advertise tar and nicotine levels in accordance with the Cambridge Filter Method.

In comparison, the government contract in *Fung* was not compelled and could be considered a "voluntary agreement" and yet was certainly enforceable once entered. Similarly, in the Agent Orange case, Diamond Shamrock *chose* to participate in the herbicide industry and was already manufacturing herbicide with some of the components of Agent Orange before it was compelled to turn over its Agent Orange to the government. *See Winters*, 149 F.3d at 399. Even a volunteer can be "acting under" a federal officer. In *Oregon v. Cameron*, 290 F.Supp. 36, 37 (D.Or.1968), an unpaid supervisor of a volunteer program and other participants were acting under a federal officer when they entered a farm to help a migrant worker obtain health care. Removal was appropriate because the volunteers were assigned pursuant to federal statute "to work in meeting the health . . . needs of . . . migratory workers and their families." *Id.* at 38. They chose to participate in the program and acted in accordance with the duties they had been assigned, just as Philip Morris has chosen to participate in the cigarette industry and has agreed to follow the FTC's policies.

We have been instructed by the Supreme Court to interpret this removal statute broadly, to give effect to its purpose. *See Colorado v. Symes*, 286 U.S. 510, 517, 52 S.Ct. 635, 76 L.Ed. 1253 (1932); *Willingham v. Morgan*,

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[4] The FTC additionally stated that "the public interest requires that all test results presented to the public be based on a uniform method used by all laboratories" because "[u]se of more than one testing method . . . would only serve to confuse or mislead the public." News Release, FTC (Aug. 1, 1967). It added that "statements or representations based on non-standardized tests having no official or governmental sanction would tend to confuse and mislead the public." Letter from FTC secretary Joseph W. Shea to Howard Bell (Oct. 25, 1967).

395 U.S. 402, 406-07, 89 S.Ct. 1813, 23 L.Ed.2d 396 (1969); *see also Winters*, 149 F.3d at 398. In essence, the requirement that the companies enter the agreement was a rule in substance though not in form. If we give the statute a broad and liberal interpretation as we are required to do, the fact that the FTC approved an agreement instead of proposing a rule should not defeat removal under section 1442(a).

The FTC involved itself in the tobacco industry to an unprecedented extent. Throughout the record, there were several indications that both developing a testing method and carrying out the testing evidenced an unusually high level of governmental participation and control. Deputy Director of the Bureau of Consumer Protection of the FTC, C. Lee Peeler, could not recall any other instance where the FTC had gone so far as to specify the testing methodology. To actually conduct the testing itself for over twenty years, instead of delegating that task to the industry, was outside the government's normal course of conduct. The operation of a cigarette lab by the FTC was "really something that was unique" and "unusual for . . . the Commission."

The record is filled with FTC announcements of its policy as well as communications between the FTC and the cigarette industry, which show comprehensive and detailed control. The record establishes that Philip Morris acted under the direction of a federal officer.

II.

For federal officer removal there must be a "causal connection" that links the federal officer's direction and control to the acts challenged in the plaintiff's complaint. It must be shown that "the acts that form the basis for the state civil or criminal suit were performed pursuant to an officer's direct orders or to comprehensive and detailed regulations." *Virden v. Altria Group*, 304 F.Supp.2d 832, 844 (N.D.W.Va.2004) (quoting *Ryan v. Dow Chem. Co.*, 781 F.Supp. 934, 947 (E.D.N.Y.1992)). Here, the acts

regulated by the FTC form the basis for Watson's and Lawson's class action.

The complaint in *Tremblay v. Philip Morris*, 231 F.Supp.2d 411, 418-19 (D.N.H.2002) was drawn more narrowly than Watson's and Lawson's complaint. The court in *Tremblay* held that Philip Morris's actions were not conducted under the direction of a federal officer or agency because the complaint did not challenge the "enforcement or wisdom of any FTC policy, procedure or regulation." *Id.* at 419. Instead, the complaint alleged that Philip Morris manipulated the FTC's policies and exploited the Cambridge Filter Method. *Id.* at 419.

The allegations of the complaint in *Paldrmic* also focused narrowly on the manufacture and design of the cigarettes. "Although the Cambridge System is deeply intertwined with plaintiff's allegations, the gravamen of his lawsuit is that defendant, fully aware that it had agreed to communicate tar and nicotine test results within certain parameters, designed and manufactured its product so as to use the test to mask the truth about its product." 327 F.Supp.2d at 967. The conduct challenged in the complaint was the design or manufacture of cigarettes, and the FTC did not direct Philip Morris how to design and manufacture its product. *Id.*

In this case, Watson and Lawson challenge more than just the cigarette design. They also challenge Philip Morris's "marketing and promoting" of low tar and nicotine cigarettes, its "representations," and its alleged deception of consumers. Thus, in part, their complaint challenges Philip Morris's advertising. It cannot seriously be argued that the FTC does not direct and control the advertising of cigarettes. This Court must look at the FTC's regulation of cigarette advertising because the conduct Watson and Lawson challenge includes cigarette advertising.

Here, Watson and Lawson claim that Philip Morris's use of low tar descriptors such as "lights" or "lowered tar" are deceptive or misleading because the actual tar and nicotine delivered to the smoker is much higher than the

FTC results communicate to smokers. The FTC defines "low tar" as 15.0 mg. or less tar.[5] *FTC Report to Congress, Pursuant to the Federal Cigarette Labeling and Advertising Act* (1979).

In 1971, the FTC and American Brands, Inc. entered into a consent order based upon a complaint the FTC issued. There, the FTC explained its view of how the use of certain descriptors could constitute deceptive advertising – it would be deceptive to use descriptors like "low," "lower," "reduced," or other qualifying terms unless the tar and nicotine levels were also stated. The tar and nicotine levels were to be measured by "the testing method employed by the Federal Trade Commission," which is the Cambridge Filter Method. Watson and Lawson claim it is deceptive for Philip Morris to use a low tar descriptor in conjunction with its cigarette's FTC rating. The very combination Watson and Lawson challenge as deceptive is the same combination the FTC requires to not be deceptive. Whether Philip Morris's labeling of cigarettes as "lights" is deceptive directly implicates the enforcement and wisdom of the FTC's tobacco policies.

It is not as if Watson and Lawson discovered new designs by Philip Morris that the FTC did not contemplate when it required the disclosure of test results. The FTC was well-aware of the limitations of the Cambridge Filter Method. In 1977, the FTC solicited public comment on a problem similar, if not identical to, some of Watson's and Lawson's claims in this case. The FTC studied how the placement of ventilation holes in cigarettes affected their tar and nicotine ratings. If vent holes were covered by the smoking machine's cigarette holder, but open when smoked by a person, then less tar and nicotine would pass through the cigarette to the smoker than the ratings reflected. Conversely, if the smoker covered vents that the

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[5] The FTC recognized that cigarette manufacturers have also used the term "ultra low tar" for cigarettes containing 1.0–5.0 mg. tar, but the FTC has not formally defined that term.

machine's cigarette holder left open, more tar and nicotine would pass through the cigarette to the smoker than the ratings reflected.

The FTC was fully aware that the placement of ventilation holes near the tip of the cigarette complicated the comparability of the tar and nicotine ratings among different brands. The same problem reemerged in the early 1980's when Brown and Williamson developed the Barclay brand, which had ventilation channels instead of ventilation holes. Although the FTC recognized these problems and solicited comment on them, the FTC ultimately chose to continue using the Cambridge Filter Method.

Watson and Lawson challenge the FTC's policy judgment that despite the failure of the Cambridge Filter Method to take into account ventilation holes or channels, the test results should still be included in advertising, even if alongside "light" descriptors, to prevent deception. In contrast, Watson and Lawson claim that this grouping of test results and descriptors renders advertising deceptive. Their claims are sufficiently related to the FTC's direct and comprehensive control to establish a causal connection.

III.

The final two requirements for removal under 28 U.S.C. § 1442(a) are that Philip Morris must present a "colorable federal defense" and that it must be a "person" within the meaning of the statute. To satisfy the requirement of a colorable federal defense, Philip Morris pleaded that Watson's and Lawson's state law claims were preempted by Section Five of the Federal Cigarette Labeling and Advertising Act. Philip Morris's Notice of Removal cites *Geier v. American Honda Motor Co.*, 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) in support of its preemption defense. The district court order stated that Watson and Lawson "do not dispute that the federal preemption defense raised by the Defendants is a 'colorable' claim to a federal defense." Slip op. at 14. The court cited *United States v. Todd*, 245 F.3d 691, 693 (8th Cir.2001), that for a

defense to be colorable it need only be plausible and further stated that it did not believe the district court opinion in *United States v. Philip Morris, Inc.*, 263 F.Supp.2d 72 (D.D.C.2003), prevents the preemption defense from being "colorable." Slip op. at 14 & fn. 5. The district court emphasized that its decision "reaches no conclusion on the merits of Philip Morris' preemption defense but is ruling that the FTC's regulation of Philip Morris' cigarette testing and advertising rises to a level sufficient to invoke federal jurisdiction under the federal removal statute." Slip op. at 24.

In their brief before this Court Watson and Lawson state, "For the purposes of the Remand Motion only, Plaintiffs do not contest . . . whether the federal preemption defense it had raised sufficed as a 'colorable' federal defense." Watson and Lawson argue only that Philip Morris failed at a minimum to demonstrate that it acted under the direction of a federal officer, or to show a causal nexus between plaintiffs' claims and the acts of Philip Morris, allegedly performed under the color of a federal office.

Although we are required to review the requirement of a colorable federal defense for jurisdictional purposes, the threshold is quite low. We do not require the defendant to "win his case before he can have it removed." *Willingham v. Morgan*, 395 U.S. 402, 407, 89 S.Ct. 1813, 23 L.Ed.2d 396 (1969). The defendant need only raise a "colorable" federal defense. *Id.*; *Jefferson County v. Acker*, 527 U.S. 423, 431, 119 S.Ct. 2069, 144 L.Ed.2d 408 (1999). We have no hesitation in concluding that Philip Morris, in its Notice of Removal, has set forth a colorable federal defense which Watson and Lawson have not contested.

The fourth requirement for federal officer removal is that the party must be a "person" within the meaning of the statute. Several courts have concluded that a corporation can be a "person" within the requirements of federal officer removal. *See Ryan v. Dow Chem. Co.*, 781 F.Supp. 934, 946- 47 (E.D.N.Y.1992); *Fung v. Abex Corp.*,

816 F.Supp. 569, 572 (N.D.Cal.1992). We find the analysis in *Ryan* to be persuasive.

We affirm the district court's order denying remand and finding removal proper under section 1442(a).

GRUENDER, Circuit Judge, concurring.

I fully concur in the court's opinion and judgment. I write separately to emphasize that our decision today should not be construed as an invitation to every participant in a heavily regulated industry to claim that it, like Philip Morris, acts at the direction of a federal officer merely because it tests or markets its products in accord with federal regulations. I believe that in most instances, a contract, principal-agent relationship, or near-employee relationship with the government will be necessary to show the degree of direction by a federal officer necessary to invoke removal under 28 U.S.C. § 1442(a)(1). *See Virden*, 304 F.Supp.2d at 845-46 (collecting cases embodying the "regulation plus" concept, where limited discretion under a government contract, action as an agent for the federal government, or action in the nature of a government employee, in addition to government regulation, supported a defendant's invocation of the federal officer removal statute).

In this case, as the court's opinion makes clear, the FTC's direction and control of the testing and marketing practices at issue is extraordinary. The FTC developed the Cambridge Filter Method, conducted the testing itself for twenty years before farming it out to the cigarette companies, threatened a deceptive advertising action if the method of testing deviated in the smallest way from the government-mandated method and controlled the disclosure of the results throughout. Because the FTC passed the function of performing the testing to the cigarette companies while allowing them no independent control of the process whatsoever, this is a rare case in which federal officer jurisdiction is appropriate even in the ab-

sence of a contract, principal-agent relationship, or near-employee relationship with the government.

With these observations, I join the court's opinion and judgment.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

Case No. 4:03-CV-519 GTE

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

PHILIP MORRIS COMPANIES, INC., AND PHILIP MORRIS, INCORPORATED,
Defendants.

[Filed Dec. 12, 2003]

MEMORANDUM OPINION AND ORDER

Eisele, J.

Before the Court is the Plaintiffs' Motion to Remand, to which the Defendants have responded. For the reasons provided herein, the Plaintiffs' Motion will be denied.

I. Procedural Background

Plaintiffs filed this action on April 18, 2003 in the Circuit Court of Pulaski County, Arkansas, Sixth Division. On May 29, 2003, Plaintiffs filed an Amended Complaint. On June 3, 2003, Defendants were served. Defendants removed the action to this Court on July 2, 2003. Plaintiffs filed the instant Motion for Remand on August 1, 2003. The Court has also received and reviewed the Defendants' Memorandum in Opposition, filed on August 20, 2003; the Plaintiffs' Reply Memorandum, filed on September 12, 2003; the Defendants' Supplemental Memorandum, filed on November 18, 2003; and the Defendants' letter of November 19, 2003 submitting additional exhibits

(66-71). Oral argument was conducted on November 20, 2003.

Plaintiffs are smokers who have consumed approximately one pack of Marlboro Lights or more over at least the past six years. They allege that Philip Morris[1] violated the Arkansas Deceptive Trade Practices Act, Ark.Code Ann. § 4-88-107 *et seq.*, by deceptively marketing cigarettes as "lighter," or lower in tar. The essence of Plaintiffs' complaint is that Philip Morris advertised their cigarettes as light despite the fact that the cigarettes conveyed more tar and nicotine to smokers than shown by the Federal Trade Commission ("FTC") testing method, known as the Cambridge Filter Method.[2] The Plaintiffs' First Amended Complaint, filed in Pulaski County Circuit Court, states in pertinent part:

> 9. While marketing and promoting decreased tar and nicotine deliveries, Defendants designed Cambridge Lights and Marlboro Lights to register lower levels of tar and nicotine on the "Cambridge" or "Ogg" testing apparatus-the testing machine used by the tobacco industry to "measure" tar and nicotine levels in cigarettes-than would be delivered to the consumers of the product. Defendants controlled the tar and nicotine delivery of Cambridge Lights and Marlboro Lights cigarettes under machine testing conditions apparently to achieve support for their representations that their Cambridge Lights and Marlboro Lights cigarettes are "light" and contain decreased tar and nicotine and that their Marlboro Lights cigarettes contain "lowered tar and nicotine."

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[1] Throughout this opinion, the Court's reference to "Philip Morris" refers to Defendants Philip Morris Companies, Inc. and Philip Morris Incorporated jointly. The Court notes that Defendants' Supplemental Memorandum styles the case as "Watson, et al. v. Altria Group, Inc., et al." However, neither party has filed any amendment inserting Altria Group, Inc. as a Defendant.

[2] The "Cambridge Filter Method" is often referred to as the "FTC Method." The terms are used interchangeably in this Order.

10. Defendants representations that Cambridge Lights and Marlboro Lights cigarettes are "lighter" (ie: lower tar and nicotine) than regular cigarettes are deceptive and misleading and constitute unfair business practices.

11. Not only do consumers receive higher levels of tar and nicotine than the testing apparatus registers, but the smoke produced by Cambridge Lights and Marlboro Lights is more mutagenic (causing genetic and chromosomal damage) per milligram of tar than 'regular' cigarettes.

12. Defendants engaged in a common course of unfair business practices and/or deceptive and unlawful conduct in connection with the manufacture, distribution, promotion, marketing, and sale of Cambridge Lights and Marlboro Lights cigarettes by:

a. Falsely and/or misleadingly representing that their product is "light" and/or delivers lowered tar and nicotine in comparison to regular cigarettes;

b. Describing the product as light when the so-called lowered tar and nicotine deliveries depended on deceptive changes in cigarette design and composition that dilute the tar and nicotine content of smoke per puff as measured by the industry standard testing apparatus, but not when used by the consumer;

c. Intentionally manipulating the design and content of Cambridge Lights and Marlboro Lights cigarettes in order to maximize nicotine delivery while falsely and/or deceptively claiming lowered tar and nicotine. These manipulations include, but are not limited to, the modification of tobacco blend, weight, rod length, and circumference; the use of reconstituted tobacco blend, weight, rod length, and circumference; the use of reconstituted tobacco sheets and/or expanded tobacco; and the increase of smoke pH levels by chemical processing and additives, such as ammonia, which resulted in the de-

livery of greater amounts of tar and nicotine when smoked under actual conditions than Defendants represent by use of the "light" description;

d. Employing techniques that purportedly reduce machine-measured levels of tar and nicotine in Cambridge Lights and Marlboro Lights cigarettes, while actually increasing the harmful biological effects, including mutagenicity (genetic and chromosomal damage) caused by the tar ingested by the consumer per milligram of nicotine.

13. Through longstanding fraudulent and unfair conduct, Defendants willfully deceived consumers, including the Plaintiffs named herein, regarding the nature and effect of their "light" cigarettes.

Plaintiffs further indicate in their First Amended complaint that they seek class action status, with the class to include all persons who purchased Cambridge Lights and Marlboro Lights cigarettes in Arkansas for personal consumption since those cigarettes were first sold in the state.

Defendants contend that this court has jurisdiction under 28 U.S.C. § 1442(a) because Philip Morris is "a person acting under" the direction of an officer of the United States for purposes of cigarette testing and advertising. Defendants also argue that federal question jurisdiction under 28 U.S.C. § 1331 is appropriate because Plaintiffs' complaint, though premised on the Arkansas Deceptive Trade Practices Act, necessarily implicates the FTC's cigarette testing and advertising requirements, including the accuracy of the Cambridge Filter Method. Plaintiffs argue that federal jurisdiction is not appropriate under either § 1442 or § 1331 because their allegations center on Philip Morris' deceptive advertising, not the faults of the Cambridge Filter Method. The Court concludes, for the reasons stated below, that it has jurisdiction under 28 U.S.C. § 1442(a)(1). Therefore, the Court will not address removal pursuant to 28 U.S.C. § 1331.

II. Factual, Statutory, and Regulatory Background

The FTC's jurisdiction over advertising and testing of tar and nicotine content of cigarettes is premised on the Federal Trade Commission Act. Title 15 U.S.C., Section 45(a) of the Act declares unlawful "unfair methods of competition in or affecting commerce and unfair and deceptive acts or practices in or affecting commerce." Section 45(a) also grants the FTC broad authority to prevent such unfair and deceptive acts, including unfair and deceptive advertisements for products such as tobacco. *See Federal Trade Commission v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 40 n. 2 (D.C.Cir.1985).

Judge Bork discussed the FTC's regulation of the advertising of tar and nicotine content claims in the following excerpt from *Brown & Williamson*:

> Since at least the mid-1950's the FTC has been concerned about the validity of tar and nicotine content claims in cigarette advertising. In 1955 the Commission published cigarette advertising guides advising manufacturers to make no representations about the tar and nicotine content of a cigarette that could not be supported with reliable scientific evidence. By the mid-1960's the FTC became concerned about the absence of a standard method for testing cigarette delivery of tar and nicotine. Accordingly, in 1967 the Commission adopted a testing method and began a program to analyze the tar and nicotine levels of each brand of cigarettes sold in the United States.
>
> The test adopted by the FTC is known as the Cambridge Filter Method and is used with minor variations throughout the world. The test utilizes a smoking machine that takes a 35 milliliter puff of two seconds' duration on a cigarette every 60 seconds until the cigarette is smoked to a specified butt length. The tar and nicotine collected by the machine is then weighed and measured. This provides an objective basis for assessing the relative amounts of tar and nicotine different cigarettes will deliver when they

are smoked in the same way. The test does not measure the amount of tar or nicotine that any individual smoker may receive since that quantity will depend on individual smoking behavior.

In 1970, the FTC proposed a formal rulemaking in order to promulgate a Trade Regulation Rule requiring disclosure of FTC tar and nicotine ratings in cigarette advertising. Immediately following this proposal, five leading cigarette companies, including B & W, agreed among themselves to a voluntary disclosure plan (the "1970 agreement"). This plan provided that the cigarette manufacturers would disclose the tar and nicotine figures in all advertising for their cigarettes according to the most recently published Commission test results. Upon accepting the 1970 agreement, the FTC indefinitely suspended its rulemaking proceeding.

Brown & Williamson, 778 F.2d at 36-37. The FTC's proposed rule was published in the Federal Register. *See* Proposed Rule Making by the Federal Trade Commission Regarding Advertising of Cigarettes, 35 Fed.Reg. 12671 (August 8, 1970). The voluntary agreement itself was reflected in a letter to the FTC signed by eight cigarette manufacturers, including Philip Morris. That letter states:

In accordance with the Commission Press Release of October 1, 1970, each of the undersigned companies which manufactures, or is a primary distributor of, varieties of cigarettes which are presently advertised, and any of its subsidiaries similarly engaged, is writing to set forth a voluntary program for the disclosure of "tar" and nicotine in its paid consumer-directed cigarette advertising in the United States placed by each of the undersigned companies.

Under this program, each company will disclose clearly and prominently for the variety of cigarettes advertised the values for "tar" in milligrams and for nicotine in tenths of a milligram contained in the

> Federal Trade Commission published test results, under its present methodology, in all advertising newspapers, magazines, and other periodicals published and distributed in the United States. . . . Each of these advertisements will include the "tar" and nicotine data, as rounded off by the Federal Trade Commission, from the Commission test results most recently published in the Federal Register. . . . Necessarily, the carrying out of this voluntary program is predicated upon the Commission continuing to test the advertised varieties of cigarettes and to publish its results in the Federal Register at regular and periodic intervals of not more than six months. . . . Each of these companies is confident that the program presented, which they intend to begin thirty working days after the Commission has considered it in lieu of any formal Trade Regulation Rule proceeding and hearing, constitutes a plan that is feasible.

See Defendants' exhibit 66, Letter from Ross R. Millhiser, President, Philip Morris, U.S.A., et. al. to Federal Trade Commission (December 17, 1970).

As the FTC recently stated, the voluntary agreement "remains in effect today, and it forms the basis for current disclosure of tar and nicotine yield." *See* Cigarette Testing;-Request for Public Comment, Federal Trade Commission, 62 Fed.Reg. 48158, 1997 WL 563104 (February 12, 1997). The FTC itself tested cigarettes in its own lab using the Cambridge Filter Method until 1987. *Id.* Lee Peeler, an employee of the FTC since 1973, testified in a Rule 30(b)(6) deposition in the case of *United States v. Philip Morris, Inc.*, then pending in the District of Columbia Federal District Court, regarding the approximately twenty year period in which the FTC tested cigarettes in its own lab:

> A. The point I was trying to make is that the . . . operation of the cigarette lab was really something that was unique and . . . was designed to prevent a certain type of deception, but . . . as we said when we closed the lab it was unusual for a pro-

gram like that to be maintained by the Commission.

Q. Right. We're going to talk about that specifically. There are other industries that run testing and it was unusual for the Commission itself to be running the testing for the cigarette industry, right?

A. It is both unusual for the Commission to be running the testing and to be the agency that specified the testing methodology because . . . I can't recall any other instances where the FTC itself specifies the testing methodology . . . . .

Q. Okay, Now I think you testified earlier that having the FTC run the testing lab is unusual.

A. Among government programs it seems very unusual to have an agency actually doing the testing for an industry.

See Defendants' Exhibit 70, Deposition of C. Lee Peeler, Deputy Director of the Bureau of Consumer Protection of the FTC, pp. 96-97, taken in connection with *United States v. Philip Morris*, Case No. 99-CV-02496 (D.D.C. July 30, 2002).

In 1987, the FTC closed its testing lab, but required manufacturers, including Philip Morris, to continue testing cigarettes using the Cambridge Filter Method. *See* Cigarette Testing; Request for Public Comment, Federal Trade Commission, 62 Fed.Reg. 48158, 1997 WL 563104. Responsibility for conducting the testing was transferred to the Tobacco Institute Testing Lab ("TITL")[3], and the voluntary agreement was modified to reflect the change. *See* Defendants' Exhibit 67, Letter from John P. Rupp, counsel to TITL, to Judith P. Wilkenfield, Program Adviser, Cigarette Advertising and Testing, Federal Trade

[3] TITL had been testing cigarettes under the Cambridge Filter Method prior to the transfer of authority in 1987. *See* Peeler Deposition at 198. The TITL lab and the FTC lab had collaborated to ensure accuracy of test results. *Id.* The FTC considered the uniformity between TITL's testing results and the FTC lab's testing results in abolishing the FTC lab and transferring sole testing authority to TITL. *Id.*

Commission dated June 30, 1987; *see also* Cigarette Testing, 62 Fed.Reg. 48158. Although TITL is an industry funded lab, the FTC retains the authority to inspect the lab. *Id*; *see also* Defendants' exhibit 70, Peeler Deposition at 201. An FTC contractor and former director of the FTC laboratory has unrestricted access to the TITL laboratory to monitor and review the testing process. *See* Defendants' Exhibit 20, Federal Trade Commission, Tar, Nicotine, and Carbon Monoxide of the Smoke of 1206 Varieties of Domestic Cigarettes for the Year 1994 (1997). Additionally, the FTC requires cigarette manufacturers, by "compulsory process" to provide results of TITL testing for all cigarettes to the FTC. *See* Cigarette Testing, 62 Fed.Reg. 48158; *see also* Peeler Deposition at 202. The results obtained by the FTC are published annually in the Federal Register.

The FTC recently described the FTC Method in a request for public comment published in the Federal Register:

> Thus, although some changes have been made, the modified Cambridge Filter Method adopted by the Commission in 1967 remains essentially in place today. The Commission's test method was not designed 'to determine the amount of 'tar' and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by a machine in accordance with the prescribed method.' The purpose of the program was to provide smokers seeking to switch to lower tar cigarettes with a single, standardized measurement with which to choose among the existing brands. This goal was consistent with the then-consensus of the scientific community that lower tar and nicotine cigarettes should be less harmful than higher tar and nicotine brands.

See Cigarette Testing; Request for Public Comment, Federal Trade Commission, 62 Fed.Reg. 48158. (February 12, 1997).

In addition to mandating the disclosure of tar and nicotine values under the FTC Method in all cigarette advertising, the FTC permits a manufacturer to advertise a cigarette as "low tar" or "light" if a cigarette's tar value under the FTC Method is 15.0 mg or less.[4] As with disclosure of tar and nicotine values under the FTC Method, no formal rule permitting descriptors such as "light" or "low tar" was ever promulgated. However, the FTC has, in a variety of advisory opinions and proceedings, expressed its view that cigarette companies engage in deceptive advertising in violation of the Federal Trade Commission Act when they advertise cigarettes as "light" or "low tar" without publishing Cambridge Filter Method test results that reflect that the cigarettes are, in fact, "low tar."

In 1971, the FTC issued a complaint against American Brands, Inc. for advertising cigarettes as "lower in tar" without disclosing Cambridge Filter Method tar ratings. *In the Matter of Am. Brands*, 79 F.T.C. 255, 258-259 (1971). As a result of that complaint, the FTC and American Brands, Inc. entered into a consent order requiring American Brands to cease advertising its cigarettes as low tar without clearly disclosing FTC Method tar ratings. *Id.* In 1978, the FTC issued an advisory opinion to Lorillard, another cigarette manufacturer. *See In re Lorillard*, 92 F.T.C. 1035 (1978); *see also* Defendants' Exhibit 70, Peeler Deposition at 470. That opinion stated the Commission's view that it would be deceptive to advertise a cigarette tar figure that differed from that obtained using the FTC method. *Id.*

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[4] The FTC stated in Reports to Congress for 1979 and 1980 that it defined "low tar" as 15.0mg or less of tar under the Cambridge Filter Method. *See* Defendants' Exhibits 55 and 56, Federal Trade Commission, Report to Congress, Pursuant to the Federal Cigarette Labeling and Advertising Act, For the Years 1979 and 1980, n.8, n.11; *but see* Cigarette Testing, Request for Public Comment, Federal Trade Commission, 62 Fed.Reg. 48158 (February 12, 1997) (stating that the FTC had never defined 'low tar"). The FTC has not formally defined other descriptors, such as "ultra low tar," but that term is generally understood to mean 6 mg or less of tar and nicotine. *Id.*

In 1981, the FTC began an investigation of Brown and Williamson, manufacturer of Barclay cigarettes, for advertising cigarettes as "1 mg tar, .2 mg nicotine by the FTC method." *See FTC v. Brown & Williamson*, 778 F.2d 35, 37 (D.C.Cir.1985). The FTC first concluded that the method did not accurately measure the tar content of Barclay cigarettes, and attempted to require Barclay advertisements to state an estimated tar content of 3 to 7 mg. of tar. *Id.* at 38. Barclay refused, but revised its advertisements to state that the 1 mg tar content was produced using a method recognized by independent laboratories, not the FTC. *Id.* The FTC filed suit in Federal District Court seeking an injunction to prevent Brown and Williamson from continuing to advertise Barclay cigarettes in a false and deceptive manner in violation of § 45(a) of the Federal Trade Commission Act. *Id.* The District Court granted injunctive relief, which the District of Columbia Court of Appeals eventually curtailed on First Amendment grounds. *Id.* *See* further discussion *infra*.

The FTC again challenged a cigarette manufacturer's "low tar" advertising in 1994 when it contested American Tobacco's claim that consumers would get less tar by smoking 10 packs of Carlton cigarettes than by smoking a single pack of the other brands. The FTC found these advertisements deceptive, and entered into a consent agreement with American Tobacco prohibiting the ads.

Despite the FTC's pursuit of companies that did not disclose FTC Method test results with their "light" advertisements, the FTC acknowledged flaws in the FTC Method on several occasions. In 1977, the FTC evaluated the FTC Method's ability to measure tar delivery to human smokers when cigarettes are designed with ventilation holes. Ventilation holes, like the various cigarette design components that Plaintiffs allege Philip Morris uses, cause smokers that smoke in certain ways to receive a higher amount of tar and nicotine than is reflected in the FTC Method's ratings. After investigating, the FTC directed that the FTC Method would not be changed. In 1981, the FTC evaluated the Cambridge Filter Method's

inability to measure the tar and nicotine content of Barclay Cigarettes. *See Brown & Williamson*, 778 F.2d at 37. Other cigarette manufacturers, including Philip Morris, complained to the FTC that the ventilation system in Barclay cigarettes produced a lower tar rating under the FTC Method, but produced much higher tar when smoked by actual humans. *Id.* at 37. Although the FTC concluded in 1982 that the FTC Method did not accurately measure Barclay cigarettes, the FTC continued to mandate that all cigarettes other than the Barclay be tested according to the method. *Id.* at 38. The FTC also continued to evaluate the FTC Method after the *Brown & Williamson* decision. An FTC official acknowledged this evaluation, when she stated:

> Since the Brown & Williamson decision, the Commission has conducted an ongoing review of the cigarette testing methodology that, among other things, has examined possible ways to measure the effects of compensatory smoking, but to date no cigarette company, scientific agency or health group has offered a viable alternative to the present testing system.

See Defendants' Exhibit 33, Letter from E. Rock to Hon. T.A. Luken (June 17, 1988). The Cambridge Filter Method remained mandatory for all cigarettes but Barclay. *See Brown & Williamson*, 778 F.2d at 37.

In 1997, the FTC solicited public comment on proposed ways to alter the FTC Method and to change cigarette advertising to better reflect the method's inability to measure the tar and nicotine actually conveyed to smokers. *See* Cigarette Testing; Request for Public Comment, Federal Trade Commission, 62 Fed.Reg. 48158 (February 12, 1997). The request for public comment summarized the history of the Method and its regulation by the FTC. *Id.* The FTC first acknowledged that the voluntary agreement that bound cigarette manufacturers to disclose FTC Method results formed the basis for the FTC's annual, compulsory demand for cigarette tar and nicotine ratings. *Id.* The request went on to summarize current concerns about the FTC Method:

Changes in cigarette design and increased knowledge about human smoking behavior have highlighted the limitations of the existing test method. In particular, research indicates that smokers switching to cigarettes at the lower end of the range of machine measured nicotine yields tend to take larger and more frequent puffs to satisfy their need for nicotine. This compensatory smoking behavior substantially reduces the informative value of the current ratings. As a result, public and private health groups and others have questioned the usefulness of the FTC ratings over the past few years, suggesting that they may mislead consumers with respect to the relative risks of smoking cigarettes with various levels of tar and nicotine ratings.

The Commission has been especially concerned that some consumers may believe that the existing machine measured yields are literal indicators of how much tar and nicotine they will get from particular brands of cigarettes. To the extent that smokers interpret current tar and nicotine disclosures in this manner, they may fail to understand that the amount of tar and nicotine they get from a cigarette depends in part on how that cigarette is smoked. In addition, smokers--especially those who engage in compensatory smoking--may underestimate the risk associated with lower rated brands by assuming that a very low tar yield necessarily translates into a correspondingly low health risk. In fact, even the lowest rated cigarette represents an important adverse health risk. . . .

The FTC protocol was based on cursory observations of human smoking behavior. Actual human smoking behavior is characterized by wide variations in smoking patterns which result in wide variations in tar and nicotine exposure. Smokers who switch to lower tar and nicotine cigarettes frequently change their smoking behavior which may negate potential health benefits.

Cigarette Testing, 62 Fed.Reg. 48158. The request for comment also cites several changes to the FTC Method proposed at a conference held by the National Cancer Institute at the request of the FTC, and requests comments on ways to improve communication of the FTC Method ratings through advertising. *Id.* In addressing the weaknesses of the current advertising requirements, the Commission commented:

> Finally, the Commission considered keeping the current unitary rating system and adding disclosures warning smokers that the amount of tar and nicotine they get will vary depending on how a cigarette is smoked. This plan has the advantage of avoiding the costs and complexities involved in moving to a two-tier system. It would emphasize the artificial nature of the smoking machine measurements and the fact that ratings produced by machines do not indicate what smokers actually get from their cigarettes. The advertising disclosure, along with appropriate education efforts, could potentially inform smokers about compensation and ways to avoid it. The Commission believes, however, that unitary ratings will be less effective than a range of ratings in communicating to smokers the variability in potential smoke ingestion.
>
> The Commission is seeking comment on the desirability and feasibility of these alternative approaches to revising the test method.

Id.

In 1998, the FTC informed Senator Frank Lautenberg, in response to his letter inquiring as to the status of the proposed changes, that the FTC was still evaluating problems with the Cambridge Filter Method. *See* Defendants' Exhibit 63, FTC News (Nov. 24, 1998). Finally, Defendant's counsel reported to this Court at oral argument that the FTC continues to evaluate the Cambridge Filter Method at the present time, but has not yet adopted any other testing procedure or any substantial changes to the Method. Additionally, Peeler testified in his deposition

that the FTC had not come to a final determination as to whether to keep, abandon, or revise the Method. *See* Defendants' Exhibit 70, Peeler Deposition at 367, 587.

As the Peeler deposition and the FTC's 1997 request for public comment make clear, the voluntary agreement of 1970 remains in place and the FTC continues to ensure compliance with that agreement by inspecting the TITL testing facility, compelling cigarette manufacturers to disclose tar and nicotine ratings for all cigarettes both to the FTC and in all advertisements, and publishing tar and nicotine figures in the Federal Register.

III. Discussion

Ordinarily, the Court may only accept a case upon its removal from a state court if the lawsuit is one that could have been originally brought in federal court. *See* 28 U.S.C. § 1441. For example, removal is appropriate in federal question cases, that is, cases arising under the Constitution, laws or treaties of the United States, because Federal Courts have original jurisdiction over those cases under 28 U.S.C. § 1331. In the typical § 1331 situation, the well-pleaded complaint rule provides that a civil action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law. *See Crews v. General American Life Ins. Co.*, 274 F.3d 502, 504-05 (8th Cir. 2001). As a general rule, a federal defense will not give rise to federal question jurisdiction. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987).

The federal officer removal statute, 28 U.S.C. § 1442, provides an exception to the general rule. This statute "serves to overcome the 'well-pleaded complaint rule' which would otherwise preclude removal even if a federal defense were alleged." *See Mesa v. California*, 489 U.S. 121, 136, 109 S.Ct. 959, 103 L.Ed.2d 99 (1989). "The right to removal [under § 1442] 'is made absolute whenever a suit in a state court is for any act under color of federal office, regardless of whether the suit could originally have been brought in federal court.'" *See United States v. Todd*,

245 F.3d 691, 693 (8th Cir. 2001) (quoting *Willingham v. Morgan*, 395 U.S. 402, 406, 89 S.Ct. 1813, 23 L.Ed.2d 396 (1969)).

A. Standard for Removal based on Federal Officer Jurisdiction

28 U.S.C. § 1442(a)(1) provides:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place where it is pending:
>
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office . . .

Id. In *Mesa*, the United States Supreme Court set forth a three-part test for determining whether § 1442(a)(1) is applicable. To remove under § 1442(a)(1), a defendant must: (1) have acted under the direction of a federal officer; (2) raise a "colorable" federal defense to the plaintiffs' claims and (3) demonstrate a causal nexus between plaintiffs' claims and the acts Defendant performed under color of federal office. *Mesa*, 489 U.S. at 124-25. A defendant must also be a "person" within the meaning of § 1442(a)(1).

The Plaintiffs do not dispute that both of the Defendant corporations are "persons" within the meaning of § 1442(a)(1). *See Ryan v. Dow Chem. Co.*, 781 F.Supp. 934 (E.D.N.Y.1992) (Holding a corporation to be a person within the statute and noting that "a corporation could be engaged in activities that amount to the implementation of federal policy under the direction of a government officer.") They also do not dispute that the federal preemption defense raised by the Defendants is a "colorable" claim to a federal defense.[5] *See United States v. Todd*, 245 F.3d 691,

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[5] The Court notes the case of *U.S. v. Philip Morris*, in which the District Court for the District of Columbia held that FTC jurisdiction over

693 (8th Cir. 2001) ("For a defense to be considered colorable, it need only be plausible; § 1442(a)(1) does not require a court to hold that a defense will be successful before removal is appropriate"). Plaintiffs, however, do contest whether Philip Morris was acting at the direction of a federal officer and whether a causal nexis exists between Philip Morris and the FTC regarding the testing and marketing of "light" cigarettes.

The "person acting under" element and the causal nexis element tend to converge into a single issue: whether the actions that form the basis of the state suit were performed pursuant to comprehensive and detailed federal government regulation. *See Ryan v. Dow Chem. Co.*, 781 F.Supp. at 947. Participation in an industry regulated by the federal government is insufficient alone to support removal. There must also be detailed and specific involvement by the federal government. *Id.* If direct and detailed regulation does exist, the Defendant must have been following that federal direction in performing the actions that form the basis of the lawsuit. *Id.* To determine whether Philip Morris acted under the direction of a federal officer, the Court must decide whether the FTC's regulation of cigarette testing and advertising constitutes the direct and detailed control required to invoke § 1442(a)(1) jurisdiction and whether the manner in which Philip Morris tested and advertised Malboro Lights and Cambridge Lights was directed by the FTC.

Several courts have addressed the level of regulation necessary for a private person or corporation to act under the direction of a federal officer. In many of these cases, courts have evaluated whether government contractors

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cigarette advertising, marketing, promotion and warning claims did not prevent the government from bringing civil Racketeer Influenced and Corrupt Organizations Act (RICO) claims against several cigarette manufacturers for a wide range of actions involving deceptive advertising. *See U.S. v. Philip Morris*, 263 F.Supp.2d 72 (D.D.C.2003). The Court would consider this case in ruling on the merits of Defendants' preemption defense, but does not believe that *U.S. v. Philip Morris* prevents Defendants' preemption defense from being "colorable."

had sufficiently detailed contact with the contracting agency to allow federal officer removal. In *Crackau v. Lucent*, 2003 WL 21665135 (D.N.J. June 25, 2003), radar technicians and operators sued the manufacturer of certain radar devices for injuries sustained due to exposure to ionizing radiation allegedly emitted by the radar devices. *Id.* at 1. Jurisdiction under § 1442(a)(1) centered on the U.S. Army's involvement in the development of the radar system. At a hearing on a motion to remand, Lucent presented evidence that the Army controlled training given to technicians, wording in manuals accompanying radar devices, and specifications of the radar system at issue in the suit. *Id.* at 3. Lucent would have had to obtain prior approval from the Army before modifying the equipment used in manufacturing the radar system. *Id.* at 3. Since "government guidelines and specifications controlled Lucent's activities," the Court concluded that federal officer jurisdiction existed. *See Crackau*, 2003 WL 21665135 at 5.

Similarly, in *Fung v. Abex Corporation*, 816 F.Supp. 569 (N.D.Cal.1992), employees of a contractor sued the contractor for damages arising from injuries allegedly caused by exposure to asbestos during manufacture of submarines for the Department of Defense. The Department of Defense monitored the manufacture of the submarines, required construction and repair in accordance with contract specifications, and subjected all supplies used in the manufacturing process to inspection, test, and approval. *Id.* at 572-573. The Court found that this level of governmental oversight was "direct and detailed," rendering federal officer removal appropriate. *Id.*

Another case involving a Department of Defense contractor reached a different conclusion. In *Ryan v. Dow Chemical*, civilians present in Vietnam sued the manufacturers of "Agent Orange" in state court for injuries caused by exposure to the herbicide. *See Ryan*, 781 F.Supp. at 937. The manufacturers attempted to remove under § 1442(a)(1), arguing that contracting to sell, manufacture, and deliver Agent Orange to the Department of Defense satisfied the "acting under" requirement. *Id.* The Court

acknowledged that the interaction between the manufacturers and the Defense Department presented a close call, but ultimately decided that federal officer removal was not appropriate. *Id.* at 947, 953. The Court distinguished the design and formulation of Agent Orange from the production and delivery of the herbicide. *Id.* at 950. The Court noted that the Department of Defense did not control the herbicide's development, but only directed the production and sale of the product. *Ryan*, 781 F.Supp. at 950. Therefore, the Court concluded that the manufacturers did not act under the direction of a federal officer when they created Agent Orange. *Id*; *see also Pack v. AC and S, Inc.*, 838 F.Supp. 1099, 1103 (D.Md.1993) (Holding government construction, design, and testing of turbines under government specifications amounted to direct and detailed control, constituting more government direction than the purchase at issue in *Ryan*).

Two cases involving personnel associated with the Office of Economic Opportunity (OEO) are also instructive. In *Oregon v. Cameron*, 290 F.Supp. 36 (D. Oregon 1968), the state of Oregon sued workers in the Volunteers in Service to America ("VISTA") program for trespass stemming from an incident in which the volunteers went onto a farm to pick up a child of migrant workers for a visit to a doctor. 42 U.S.C. § 2992 authorizes the director of the OEO "to work in meeting the health, education, welfare, or related needs of . . . migratory workers and their families." Based on this statute and the OEO's general directions that VISTA volunteers were to work with migrant farm workers, the Court concluded that the volunteers acted under the direction of a federal officer in entering the farm to pick up the child. *Id.* at 38. The Court reached this conclusion even though 42 U.S.C. § 2992 emphasizes the limited employee status of VISTA personnel.

The second OEO case involved attorneys with a legal services corporation. *See Gurda Farms v. Monroe County Legal Assistance Corp.*, 358 F.Supp. 841 (S.D.N.Y.1973). Employers of migrant farm workers brought suit against a legal assistance corporation and lawyers associated with

the corporation for conspiracy to induce workers to breach their employment agreements and for civil assault. *Id.* at 842. The Monroe County Legal Assistance Corp. received a grant from the OEO to serve the needs of migrant farm workers. *Id.* at 845. In order to receive the grant, the Corporation was required to comply with several O.E.O. regulations, including submitting reports and allowing audits to be performed. *Id.* The O.E.O.'s conditions for receipt of the grant amounted to sufficient governmental involvement for the Court to conclude that the attorneys were acting at the direction of a federal officer when they interacted with migrant farm workers. *Id.* at 847.

Courts have also applied § 1442(a)(1) to Medicare intermediaries. The consistent holding from these cases is that private companies acting as intermediaries in the Medicare program are persons acting under the direction of the Secretary of Health and Human Services and therefore eligible to remove actions under § 1442(a)(1). *See Peterson v. Blue Cross/Blue Shield*, 508 F.2d 55 (5th Cir.), *cert. denied*, 422 U.S. 1043, 95 S.Ct. 2657, 45 L.Ed.2d 694 (1975); *Neurological Assocs. v. Blue Cross/Blue Shield*, 632 F.Supp. 1078 (S.D.Fla.1986); *Group Health Inc. v. Blue Cross Ass'n*, 587 F.Supp. 887 (S.D.N.Y.1984); *see also Kuenstler v. Occidental Life Ins. Co.*, 292 F.Supp. 532 (C.D.Cal.1968); *Allen v. Allen*, 291 F.Supp. 312 (S.D.Iowa 1968); *see also Ryan*, 781 F.Supp. at 949. Medicare intermediaries are charged with administering the Medicare program. *See Ryan*, 781 F.Supp. at 949. They are subject to "extensive and specific" federal regulations and must satisfy "performance criteria" to remain in service as intermediaries. *Id.* at 949. After evaluating the medicare intermediary removal caselaw, the Ryan court concluded that these cases do not stand for the proposition that removal solely on the basis of a contract with the government is allowed under § 1442(a)(1). *Id.* at 949. Instead, some additional level of involvement between private entities and the government is required for the private entity to qualify for federal officer removal. *Id.*

The Eighth Circuit Court of Appeals has seldom considered the application of § 1442(a)(1) to private corporations associated with a governmental agency. *First National Bank of Aberdeen v. Aberdeen National Bank*, 627 F.2d 843 (8th Cir.1980) discusses the federal officer removal statute's application to a private company more extensively than any other Eighth Circuit case. *First National Bank of Aberdeen* involved an allegation by one bank that another bank had adopted a deceptively similar name. *Id.* at 846. The removing bank argued that federal officer jurisdiction existed because the Comptroller General of the United States had approved the name change. *Id.* The Eighth Circuit found this connection to a federal officer too remote to warrant removal based on § 1442(a)(1). *Id.* at 849, n. 13; *but see First National Bank of Bellevue v. Bank of Bellevue*, 341 F.Supp. 960 (8th Cir. 1972) (Holding removal under § 1442(a)(1) appropriate where the Secretary of the Treasury and the Department of the Air Force approved the establishment of a bank branch office on a U.S. Air Force Base).

After surveying the cases applying § 1442(a)(1), this Court concludes that, in order to obtain federal jurisdiction as a corporation "acting under the direction of a federal officer," the corporation and the federal government must interact in a way that evinces more federal control than the typical regulatory situation. As one court put it, "the rule that appears to emerge from the case law is one of regulation plus." *See Bakalis v. Crossland Bank*, 781 F.Supp. 140, 144-145 (E.D.N.Y.1991). Not only must the appropriate level of regulation be present, but the regulation must go to the heart of the cause of action asserted against the private corporation. Unfortunately, as the court in *Gurda Farms* acknowledged, "the number and complexity of federal institutions and programs render impossible the formulation" of a "precise standard for the extent of control necessary to bring an individual [or corporation] within the 'acting under' clause." *See Gurda Farms*, 358 F.Supp. at 844. The Court now turns to apply-

ing the somewhat amorphous standard of § 1442(a)(1) to the FTC's regulation of and interaction with Philip Morris.

B. Application of Federal Officer Statute to this case

This Court concludes that Philip Morris acted under the direction of a federal officer within the meaning of § 1442(a)(1) when it cited the tar and nicotine values derived from the FTC Method in its Malboro Light and Cambridge Light advertisements. The FTC's regulation of cigarette testing and advertising spans over forty years and is detailed and specific. The cigarette manufacturers entered into the "voluntary" agreement of 1970 under the threat of a proposed rule and at the behest of the FTC. In fact, FTC consent was an express condition to the agreement. The letter that set forth the voluntary agreement stated that the cigarette manufacturers "intend to begin thirty working days after the Commission has considered [the agreement] in lieu of any formal Trade Regulation Rule proceeding and hearing . . ." *See* Defendants' Exhibit 66, Letter from Millhiser. But for the FTC's actions, the manufacturers would not have entered into the agreement. Nor would the manufacturers have been obliged to test cigarettes under the FTC Method. Further, the fact that the agreement was subject to FTC approval and premised on FTC waiver of a formal rule indicates that the agreement imposed an FTC backed obligation on the cigarette manufacturers to conduct testing in accordance with the method and to disclose the testing results in all advertising.

After the manufacturers entered into the agreement, the FTC remained involved with cigarette testing and advertising in a detailed and specific manner. The FTC took the unusual and unprecedented step of conducting cigarette testing itself for approximately twenty years. Lee Peeler, who was authorized to speak for the FTC in his July, 2002 deposition, testified that this approach was extremely unique and that he could not recall any other industry in which the FTC set forth testing methodology and actually tested products itself. *See* Defendants' Exhibit 70, Peeler

Deposition at 96-97. When the FTC transferred testing responsibility to TITL, it retained and used the authority to monitor TITL's lab through unannounced inspections. From 1987 to the present, the FTC has compelled TITL to produce sworn statements of Method ratings for all cigarettes which ratings were, and are, published annually by the FTC in the Federal Register.

The FTC enforced the agreement's obligation to adhere to the Method's results in cigarette advertising through the FTC's statutory authority to prevent unfair and deceptive practices in commerce. *See* 15 U.S.C. § 45(a). The FTC's 1971 complaint and consent order with American Brands, the 1978 advisory opinion to Lorillard, the 1981 investigation and succeeding lawsuit against Brown & Williamson, and the 1994 complaint and consent order against Carlton all demonstrate that the FTC believes actions contrary to the 1970 agreement and advertising inconsistent with the FTC Method to be deceptive advertising in violation of 15 U.S.C. § 45(a). The FTC clearly views testing and advertising in accordance with the FTC Method as mandatory under 15 U.S.C. § 45(a) and goes to extraordinary lengths to further that mandate. Given the FTC's efforts to direct and enforce use of cigarette ratings derived from the FTC Method in cigarette advertising, it appears clear to the Court that Philip Morris is a "person acting under" the FTC.

With regard to the causation element of § 1442(a)(1), the Court also concludes that the FTC's regulation of Philip Morris's cigarette testing and advertising forms cuts to the heart of the Plaintiffs' lawsuit. Plaintiffs contend that their allegations that Philip Morris deceptively designs their cigarettes to manipulate the FTC Method are wholly independent from testing procedures mandated by the FTC.[6] The Court disagrees. Although Philip Morris is re-

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[6] Plaintiffs state in their Reply Memorandum of Law in Support of Plaintiffs' Motion to Remand: "As made clear in their Motion for Remand, Plaintiffs do not take issue with the testing procedures Philip Morris purports to utilize or with any federal policies that define appropriate mechanisms and procedures for assaying tar and nicotine

sponsible for designing its cigarettes, the FTC mandates the method by which the tar and nicotine content of those cigarettes will be measured for advertising purposes. No matter what cigarette design Philip Morris uses, advertising for that cigarette must disclose the tar and nicotine rating calculated using the FTC Method. The FTC has expressed its opinion that other cigarette manufacturers who advertise tar and nicotine ratings derived from other testing methods violate the unfair and deceptive advertising provisions of 15 U.S.C. 45(a). *See In re Lorillard*, 92 F.T.C. 1035 (1978).

The FTC's consideration of the precise Cambridge method weaknesses that produce the allegedly misleading tar and nicotine ratings further supports the existence of the requisite causal nexis between FTC regulation of Philip Morris and the Plaintiffs' claims. On multiple occasions, the FTC has acknowledged that the FTC Method does not accurately measure the tar and nicotine conveyed to smokers. The FTC has repeatedly examined the very inaccuracies in the FTC Method that form the basis for the Plaintiffs' claims of deceptive advertising. However, the FTC continues to this day to mandate use of the FTC Method for testing and advertising.[7] Assume for the moment that, as Plaintiff alleges, Philip Morris intentionally designs its cigarettes to manipulate the method to produce

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levels in cigarettes. The conduct about which Plaintiffs complain is Philip Morris' deceptive design of its products, which makes the tar and nicotine levels measured by the Cambridge Method testing meaningless, and the Company's fraudulent marketing of its products on the basis of these 'measurements,' in claiming that their products are 'light' and deliver 'lowered tar and nicotine,' when in fact there is nothing light about them."

[7] Philip Morris itself complained of inaccuracies in the FTC Method's testing results when it complained to the FTC in 1980 that the Method inaccurately measured Brown & Williamson's Barclay cigarettes. *See Brown & Williamson*, 778 F.2d at 37-38. As a result of these complaints, the FTC reevaluated the FTC Method, but ultimately decided to continue to mandate the Method (despite its shortcomings) for all cigarettes but the Barclay. *Id.* at 38. *See* Defendants' Exhibit 33, Letter from E. Rock to Hon. T.A. Luken (June 17, 1988).

tar and nicotine ratings below 15mg so that Philip Morris can advertise those cigarettes as "Lights." Such intentional action cannot be separated from the fact that the FTC continues to require testing to be done under the Cambridge Filter Method, mandates that advertisements disclose Method results, and does not permit use of other testing methods in cigarette advertising. The FTC requires adherence to the FTC Method despite its awareness that the FTC Method does not measure actual tar and nicotine conveyed to consumers, especially when cigarettes are designed in certain ways (eg: with ventilation holes). Since the FTC, through its enforcement of the "voluntary" agreement, requires Philip Morris to disclose tar and nicotine ratings derived by using the Cambridge Filter Method in cigarette advertising-and considers the use of any other method in advertising illegal-Plaintiffs' claims that Philip Morris' advertisements are deceptive necessarily calls into question the FTC's regulation of those advertisements.

The Court recognizes that Philip Morris is not required to advertise its cigarettes as "light" or "low tar." However, it is permitted by the FTC to so advertise its cigarettes if they meet FTC's standard. Philip Morris is required to adhere to the FTC's regulation of "lights" advertising. The FTC requires disclosure of Cambridge Filter Method tar and nicotine ratings in cigarette advertisements, and has stated that a cigarette may be advertised as light if its rating using the FTC Method is less than 15mg of tar. Plaintiffs admit that Marlboro Lights and Cambridge Lights are both rated less than 15mg using the FTC Method. Therefore, any contention that Philip Morris' advertising of these two cigarette brands as "Lights" is misleading squarely confronts the FTC's mandate that cigarette companies disclose FTC Method results in advertising and use the Method to determine whether a particular cigarette may be classified as "Light."

Philip Morris' position is unique, but consistent with the holdings of cases involving government contractors. Although this case does not involve a government procurement contract, the FTC's pervasive involvement in ciga-

rette advertising and testing is analogous to the level of governmental control demanded by the courts in *Crackau*, *Fung*, and *Ryan*. The FTC dictates the manner and method by which Philip Morris will test and advertise its cigarettes just as the Department of Defense dictated the materials and specifications to be used in the manufacturing process of radar systems and submarines. The *Ryan* court's distinction between manufacturing of Agent Orange and the Department of Defense's purchase of Agent Orange is not applicable here. In the instant case, the FTC was clearly aware of the shortcomings of its advertising and testing requirements, yet chose to require use of the FTC Method in spite of those downfalls.

Philip Morris' testing and advertising of cigarettes in accordance with the FTC's mandates amounts to more than mere participation in a regulated industry. Philip Morris' testing and advertising obligations are much more specific than the general guidance given to VISTA volunteers in *Cameron* and legal services attorneys in *Gurda Farms*. *See Cameron*, 290 F.Supp. at 38; *Gurda* Farms, 358 F.Supp. at 841. Additionally, the FTC's lengthy and active interaction with cigarette testing and advertising constitutes significantly more hands-on contact than the simple approval of a bank name change. *See First National Bank of Aberdeen v. Aberdeen National Bank*, 627 F.2d 843, 846. Similar to the "integrated system of officials and private intermediaries" in the Medicare intermediary cases, Philip Morris and other cigarette manufacturers collaborate through TITL with the FTC to test cigarettes. *See Ryan*, 781 F.Supp. at 949. Further, the FTC itself took the extraordinary step of conducting that testing for much of the Plaintiffs' proposed class period. Since the FTC mandates advertising in accordance with the Method and does not permit use of any other method, Philip Morris' "Lights" advertising is closely integrated with the FTC's regulatory regime.

The FTC and cigarette manufacturers, including Philip Morris, have a forty year history of specific, detailed, and unusual regulation of cigarette testing and advertising.

Further, the FTC's mandates directly relate to the core of this lawsuit-whether advertising cigarettes as "Lights," when those cigarettes fall below 15mg under the FTC Method, is deceptive. Therefore, the Court concludes that Philip Morris acted under the direction of the FTC in testing and advertising Marlboro Lights and Cambridge Lights in accordance with the Cambridge Filter Method. In arriving at this decision, the Court emphasizes that it reaches no conclusion on the merits of Philip Morris' preemption defense, but is ruling that the FTC's regulation of Philip Morris' cigarette testing and advertising rises to a level sufficient to invoke federal jurisdiction under the federal officer removal statute.[8] Accordingly, Philip Morris properly removed this case to federal court pursuant to § 1442(a).

C. FTC Regulation Without Formal Rule

The Plaintiffs argue that the lack of formal trade regulation rules requiring use of the FTC Method to determine tar and nicotine values, requiring use of those values in advertisements, and formalizing the 15mg requirement for "Light" advertising forces the conclusion that Defendants, as a matter of law, are not "acting under the direction of a federal officer." The Court disagrees. A formal rule is not required in order for a federal agency to direct the actions of a private company. Formal rules were not present in the government contractor cases cited above. *See Crackau*, 2003 WL 21665135; *Fung*, 816 F.Supp. 569; *Ryan v. Dow Chemical*, 781 F.Supp. 934. Although the OEO possessed statutory authority to assign volunteers to aid migrant workers and to provide financial assistance to meet the legal needs of migrant workers, the courts in *Gurda Farms* and *Cameron* held that § 1442 jurisdiction was appropriate without formal rules addressing interaction with mi-

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[8] As the Court stated above, Plaintiffs have admitted that Defendants asserted federal defense of preemption satisfies the "colorable federal defense" requirement of § 1442. The Court notes that its denial of Plaintiffs' motion to remand is solely jurisdictional. The Court expresses no opinion at this time as to the merits Defendants' preemption defense other than to say that it is colorable as required by § 1442.

grant workers. *Oregon*, 290 F.Supp. 36; *Gurda Farms*, 358 F.Supp. 841. Like the OEO, the FTC possess general statutory authority to regulate cigarette testing and advertising under 15 U.S.C. § 45(a).

The FTC often regulates the industries it governs by compelling voluntary agreements and consent orders rather than promulgating formal rules. In 1987, Daniel Oliver, then Chairman of the FTC testified before a subcommittee of the House of Representatives Energy and Commerce Committee and addressed the manner in which the FTC prefers to regulate. Chairman Oliver stated:

> the FTC has discovered that rulemaking takes a very long time, and I think, therefore it is more efficient to bring a single case against the first offender in order to stop [a certain] practice before we go to rulemaking . . . it is faster – everything the Commission has done has shown that it is faster to bring a single case than to go through rulemaking . . . I'm interested not in rulemaking; I'm interested in having an effect for the benefit of consumers. If I can have a faster and better effect by bringing a case instead of making a rule, I think it serves the consumers' interest better . . . In the case of the cigarette industry, which is what we're talking about, it is entirely reasonable to suppose that one action against cigarette company would have an effect on all of them, and that you would not have to make a rule. You would do the same thing much faster bringing a single case; that would benefit the consumers. So my job is deploying resources, and I would much prefer to bring a case, which can be done in a tenth of the time that making a rule can be done. I think that's a more effective way to deploy law enforcement resources for the benefit of the consumer.

See Defendants' Exhibit 24, Hearing before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce, 100th Cong. 17-19 (1987) (statements of Daniel Oliver, Chairman of the Federal Trade Commission). Lee Peeler also commented

on the FTC's approach to voluntary agreements and consent orders:

> Q. Is there anything nefarious about the FTC obtaining an industry-wide agreement in lieu of a formal rule?
>
> A. The idea of proceeding on a voluntary basis is something the Commission has done in a variety of circumstances with a variety of industries and the Commission looks at these programs to try to make sure that they are done . . . correctly and in the public interest . . . . .
>
> Q. Why does the FTC publish consent orders?
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> A. We publish consent orders and other final agency actions for a whole variety of reasons . . . one of the purposes of bringing cases is to give guidance to other industry members about what type of conduct we would challenge. The one thing that is confusing sometimes to people is that an order contains . . . provisions that are designed to fence-in conduct . . . the complaint states the violation of laws and the order is a remedial provision.
>
> Q. I want to focus on the phrase you used "to give the industry guidance." Is there any question in your mind that the publication of the decision and order in the matter of American Brands was intended to guide the industry regarding . . . any industry actor's use of the words "low, lower, reduced or like qualifying terms" in cigarette advertising?
>
> A. It would be designed to do that, it would be designed to do that in the context of the ads that are challenged.

See Defendants' Exhibit 70, Deposition of C. Lee Peeler at 96-97.

The United States Court of Appeals for the District of Columbia Circuit has also commented on the FTC's tendency to regulate by obtaining voluntary compliance rather than by pursuing formal proceedings. *See Holloway*

v. Bristol-Myers Corp., 485 F.2d 986, 995 (D.C.Cir.1973). In the context of deciding whether 15 U.S.C. § 45 provided for a private right of action in a class action by consumers against a manufacturer of nonprescription analgesic compound for deceptive advertising, the Court stated:

> Indicative of [Congress'] fundamental policy judgment [in amending the Federal Trade Commission Act] are frequent references in the legislative history to the Trade Commission's expertise in dealing with commercial practices, its ability to act as a buffer in securing voluntary compliance through informal proceedings, and its sound discretion in determining when formal enforcement measures are necessary. Congress voiced approval of the Commission's record in shaping the fluid contours of generalized statutory policy pronouncements into meaningful and coherent rules of business conduct, and it felt that the agency's experience in making concrete the proscriptions of the 1914 Act against 'unfair methods of competition rendered the FTC particularly well suited to the responsibility of giving life to the broad standard of 'deceptiveness' as applied to advertising.

See Holloway, 485 F.2d at 995.

The FTC coerced "voluntary" action in cigarette testing and advertising in such a way that a formal rule is not required for § 1442(a) jurisdiction. The FTC made cigarette manufacturers aware that it intended to promulgate a federal rule to establish a single test to measure tar and nicotine content in cigarettes. The FTC informed the companies that the FTC would not promulgate such a rule if the companies voluntarily entered into an agreement to do such testing. The companies elected to enter into that agreement, at the FTC's behest. The FTC subsequently monitored the manufacturers' compliance with that agreement. Although the FTC had no formal rule to enforce, they used their general statutory authority to prevent unfair or deceptive acts or practices, including advertising, that affect commerce to ensure compliance with the agreement. When companies did not disclose tar and nico-

tine values derived from the FTC Method, the FTC brought enforcement actions against them.

Philip Morris, as required, followed the FTC's directives. Absent FTC regulation in this area, Philip Morris – and other cigarette manufacturers – could advertise "light" cigarettes in any manner and method that they chose. They would be free to use any test to validate their "light" claim. Instead of allowing such freedom in cigarette testing and advertising, the FTC required the FTC Method to be used and the results disclosed in advertisements. Therefore, Philip Morris has been required to use the FTC Method and to adhere to the FTC's advertising directives since the "voluntary" agreement was entered into.

Plaintiffs claim that *FTC v. Brown & Williamson Tobacco Corp.* held that the FTC cannot make the Cambridge Filter Method compulsory upon tobacco companies. The Court does not read *Brown & Williamson* so broadly. In *Brown & Williamson*, the D.C. Circuit considered a district court's permanent injunction requiring Brown & Williamson to obtain prior approval for using test results obtained from a testing system other than the FTC Method in cigarette advertisements.[9] *See Brown & Williamson*, 778 F.2d at 37. The Court first adopted the district court's finding that the FTC Method did not accurately measure Barclay cigarettes, but concluded that the use of a non-FTC sanctioned method, even with a disclaimer, would be deceptive and misleading. *See Brown & Williamson*, 778 F.2d at 41-43, 45 n. 7. In the portion of the opinion relied upon by Plaintiffs, the district court discusses whether prior FTC approval of non-FTC-Method advertisements amounts to a prior restraint in violation of the First Amendment. The court states:

> There is a problem, however, in the fact that, these safeguards notwithstanding, the injunction places the

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[9] The litigation giving rise to this injunction was an outgrowth of the FTC's efforts, at the request of competing cigarette manufacturers, to obtain accurate tar and nicotine ratings of Brown & Williamson's Barclay cigarettes. *See infra* at 8-9.

burden on B & W to justify the advertisement of results from a different system of testing which it considers superior to the FTC system, even if B & W includes a prominent disclaimer explaining that the rating comes from a new system not comparable to that used by the FTC and other manufacturers. Because the FTC has not adopted its system of testing pursuant to a Trade Regulation Rule under section 18 of the FTC Act, 15 U.S.C. § 57a(1982), one cannot say that the FTC system constitutes the only acceptable one available for measuring milligrams of tar per cigarette.

If B & W sought to advertise the results of a different system solely with respect to Barclay, this objection would be groundless. If the different system produces results not comparable to the FTC ratings used by other manufacturers, an advertisement displaying only that system's results for Barclay would have an inherent tendency to deceive, even with an explanatory disclaimer. The sole utility of any particular milligram rating is in comparison with the analogous ratings of other cigarettes. Thus, standing alone, the Barclay rating from a new system would tend to encourage comparison with the inapposite FTC ratings advertised by other manufacturers. This would tend to deceive consumers.

The injunction as written, however, would even prohibit B & W from devising a new testing system and, in advertising its results for Barclay, providing information about competing brands prominently enough and in sufficient quantity to allow consumers to make informed decisions without confusing figures from disparate testing systems. Since this would eliminate consumer confusion, we believe that the FTC must bear the affirmative burden of demonstrating any inadequacy, and thus deceptiveness, of the results obtained under such a system and advertised in the manner described. We do not wish to leave intact the injunction's requirement of prior FTC ap-

> proval of such advertising because that would enshrine the current FTC system as the sole legitimate testing method, even though it was not passed pursuant to section 18 of the FTC Act, 15 U .S.C. § 57a (1982), and subjected to the possibility of judicial review. Thus we remand this case to the district court with instructions to modify the injunction to allow for the presentation of the results of a different testing system, so long as any advertisement of such results provides sufficient data to avoid deceptiveness due to confusion with the FTC testing system. It hardly requires saying that the FTC would remain free to prove deceptiveness due to the inadequacy of the new testing system or the form of the advertisements under section 5 of the FTC Act. The Commission may, of course, address the problem by promulgating a Trade Regulation Rule under section 18 of the Act.

Brown & Williamson, 778 F.2d at 44-45.

The D.C. Circuit's holding was based on its belief that requiring prior FTC approval of cigarette advertisements referencing a different testing system but providing information about competing brands for consumer comparison of tar and nicotine values would constitute an unlawful prior restraint on speech. This holding does not mean that a cigarette company is not "acting under the direction of a federal officer" when it advertises cigarettes in accordance with the FTC prescribed method. Rather, the D.C. Circuit's opinion merely freed Brown & Williamson from having to obtain prior approval if it chose to deviate from the FTC's advertising standards. *Brown & Williamson* did not disturb the FTC provided safe harbor for cigarette manufacturers disclosing tar and nicotine values on the FTC Method in advertisements. The FTC made clear to such manufacturers that their actions would not be construed as deceptive under 15 U.S.C. § 45(a). Although a Trade Regulation Rule would fortify the FTC Method disclosure

requirement,[10] lack of a formal rule does not deprive cigarette manufacturers utilizing the FTC method to measure tar and nicotine and to advertise their products from the protection of the federal officer removal statute.

This Court believes it would be reading § 1442 far too technically if it concluded that a company may only act under the direction of a federal officer where a formal rule is issued. Formal rulemaking may be one of the principal ways federal agencies regulate, but it is clearly not the only way. In the FTC's case, it is not even the preferred way to regulate the cigarette industry. Given the number and complexity of federal programs and the variety of ways in which federal agencies bring about actions in private industries, this Court cannot say that a formal rule is the only way in which the FTC's interaction with Philip Morris would trigger application of § 1442. The manner in which the FTC has overseen cigarette testing and advertising for the past four decades and has compelled adherence to the FTC Method is sufficient to invoke federal court jurisdiction pursuant to the federal officer removal statute.

D. Contrary Authority

This Court reaches its conclusion fully aware that two other federal district courts have considered this precise issue and have reached the opposite conclusion, holding that Philip Morris could not remove "lights" class action suits under § 1442(a)(1). *See Tremblay v. Philip Morris*, 231 F.Supp.2d 411 (D.N.H.2002); *Pearson v. Philip Morris*, Case No. 03-CV-178-HA (D.Oreg. August 8, 2003). Plaintiffs' allegations here appear to be virtually identical to those raised by the Plaintiffs in *Tremblay* and *Pearson*.

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[10] By the terms of *Brown & Williamson*, a formal Trade Regulation Rule would also allow the FTC to place a constitutional prior restraint on advertisements that did not use the method. *See Brown & Williamson*, 778 F.2d at 45. Absent such a rule, the FTC is still free to regulate such advertisements, but must do so by enforcing the deceptive practices provision of 15 U.S.C. § 45(a) through compliance actions and compelled consent orders. This, of course, is the FTC's preferred way of regulating.

Tremblay, 231 F.Supp.2d at 413; *Pearson* at 2. After carefully considering the issue, this Court simply finds itself in disagreement with the holdings of *Tremblay* and *Pearson*.

The *Tremblay* Court concluded:

> Nowhere in the complaint do the plaintiffs challenge the enforcement or wisdom of any FTC policy, procedure or regulation. Further, the complaint does not allege that Philip Morris is liable simply for complying with the Cambridge Filter Method and FTC advertising policies. Rather, it clearly and concisely alleges that Philip Morris engages in a course of conduct aimed at manipulating the FTC's policies by exploiting loopholes in the Cambridge Filter Method. Because the plaintiffs are the masters of their complaint, [citation omitted], Philip Morris's attempted recasting of their claims is irrelevant.
>
> In short, this is not a case where plaintiffs seek to challenge federal policy or official action in a state court forum. Rather, the plaintiffs challenge the conduct of a private corporation, acting without direction from a federal officer or agency. Allowing this action to be litigated in state court will not interfere with the course of the FTC's duties nor its policies regarding the regulation of the cigarette industry.

Tremblay, 231 F.Supp.2d at 419. The *Pearson* court essentially adopted the reasoning of *Tremblay*. However, in reaching its decision, the *Pearson* court relied more heavily on the lack of a formal rule requiring use of the FTC Method.

This Court has concluded otherwise. Philip Morris' adherence to the FTC mandated method cannot be divorced from the tar and nicotine values assigned to its cigarettes and used, as the FTC requires, in advertisements for those cigarettes. The FTC's lengthy and detailed involvement in the way cigarettes are tested and advertised – all pursuant to its legislative mandate – amounts to more than "underlying facts used by plaintiffs to support their allegations." *See Pearson* at 10. Though no formal rule was ever

promulgated, the FTC's actions are so pervasive that they rise to the level comprehended by § 1442(a). As this Court has already stated, the fact that Philip Morris is free to design its cigarettes as it wishes does not diminish the federal direction under which Philip Morris tests and advertises those cigarettes. Given that the FTC has directed use of the Cambridge Filter Method for four decades, the inadequacies of the tar and nicotine values derived from application of the Method cannot be the sole result of Philip Morris' actions. Plaintiffs' allegations, though articulated in terms of Philip Morris' manipulative intent, squarely confront the FTC's policy that cigarette testing and advertising using the FTC Method does not violate 15 U.S.C. 45(a), but that all other testing is suspect. Although Plaintiffs are masters of their Complaint, § 1442 contemplates federal jurisdiction when a plaintiff's claims challenge private action taken at the direction of the federal government. Such is the case here. Since inadequacies in FTC policies are at the heart of Plaintiffs' complaint, this is the type of action for which § 1442 provides federal jurisdiction.

E. Judicial Estoppel

The Court rejects Plaintiffs' argument that judicial estoppel prevents Philip Morris from arguing that federal officer removal is appropriate. Judicial estoppel bars a party from taking "clearly inconsistent" positions in litigation. *See New Hampshire v. Maine*, 532 U.S. 742, 750-1, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001); *Hossaini v. W. Mo. Med. Ctr.*, 140 F.3d 1140, 1142-1143 (8th Cir. 1998). The Eighth Circuit has commented that judicial estoppel is limited to situations "tantamount to a knowing misrepresentation to or even fraud on the court." *See Total Petroleum, Inc. v. Davis*, 822 F.2d 734, 738 n. 6 (8th Cir.1987). Plaintiffs contend that judicial estoppel applies because Philip Morris' position in *Brown v. Philip Morris, Inc.*, 250 F.3d 789 (3d Cir.2001) directly contradicts the position that Philip Morris has taken in this litigation.

The *Brown* plaintiffs claimed that Philip Morris violated their rights under color of federal law by targeting adver-

tising of mentholated tobacco products to African Americans.[11] Philip Morris successfully argued that it could not be sued under *Bivens* because it was not a state actor. Determining whether a party is a state actor for purposes of applying constitutional protection is completely different than determining whether a party is "acting under the direction" of a federal officer sufficient to invoke federal jurisdiction under 28 U.S.C. § 1442. The Court agrees with the Defendant that "judicial estoppel simply does not apply where a change in a party's position arises from differences in the legal standards relevant to the underlying actions." *See* Defendant's Memorandum in Opposition to Plaintiff's Motion to Remand at 5; *see also Sumner v. Michelin N. Am., Inc.*, 966 F.Supp. 1567, 1573-76 (M.D.Ala.1997); *Holder v. Holder*, 305 F.3d 854, 872 (9th Cir.2002); *Johnson v. Or. Dep't of Human Res.*, 141 F.3d 1361, 1367 (9th Cir. 1998). Philip Morris is certainly not committing a "fraud on the court" by arguing that it is not a state actor in a *Bivens* action, but arguing that it is acting under the direction of the FTC in the instant case. *See Total Petroleum, Inc.*, 822 F.2d at 738 n. 6.

IV. Conclusion

This Court concludes that Philip Morris acted under the direction of the FTC in relying on Cambridge Filter Method tar and nicotine ratings to advertise its Marlboro Lights and Cambridge Lights cigarettes and in disclosing those ratings in such advertisements. Therefore, this Court has jurisdiction of this matter under 28 U.S.C. § 1442(a). For these reasons, described more fully above, the Court denies Plaintiffs' motion to remand to state court. Having so held, the Court also denies Plaintiffs' request for attorney fees and costs.

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[11] This action was premised on *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). *Bivens* held that violation of the Fourth Amendment by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct.

V. Interlocutory Appeal Certification

The Court has discretion to allow Plaintiffs to seek an interlocutory appeal of this order. To do so, the court must consider the requirements of 28 U.S.C. § 1292(b), which states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b).

Certification is appropriate only when the district court is "of the opinion that": (1) the order "involves a controlling question of law"; (2) "there is a substantial ground for difference of opinion"; and (3) certification will "materially advance the ultimate termination of the litigation." *See White v. Nix*, 43 F.3d 374, 377 (8th Cir.1994).

An order denying a motion to remand a case to the state court from which the case was removed may be certified for interlocutory appeal. *See* 9 James W. Moore, Moore's Federal Practice ¶ 110.22[2], at 271-72 (2d ed. 1996). Several circuits have considered interlocutory appeals of such orders. *See Sonoco Products Co. v. Physicians Health Plan, Inc.*, 338 F.3d 366, 368 (4th Cir. 2003); *Grant v. Chevron Phillips Chemical Co.*, 309 F.3d 864, 866 (5th Cir. 2002); *Lee v. American Nat. Ins. Co.*, 260 F.3d 997, 999 (9th Cir. 2001); *S.G. v. American National Red Cross*, 938

F.2d 1494, 1495-96 (1st Cir. 1991), *reversed on other grounds by American National Red Cross v. S.G.*, 505 U.S. 247, 249, 112 S.Ct. 2465, 120 L.Ed.2d 201 (1992); *Elston Inv. Ltd. v. David Altman Leasing Corp.*, 731 F.2d 436 (7th Cir. 1984). The U.S. Supreme Court has considered U.S. Court of Appeals decisions reversing, on § 1292(b) appeals, Federal District Court orders refusing to remand removed actions. *See Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 346, 119 S.Ct. 1322, 143 L.Ed.2d 448 (1999); *American National Red Cross v. S.G.*, 505 U.S. 247, 249, 112 S.Ct. 2465, 120 L.Ed.2d 201 (1992). Although this Court could not locate an Eighth Circuit case reviewing a district court's denial of a motion to remand, it located one case implying that such a procedure provides a basis for interlocutory appeal. *See Humphrey v. Sequentia, Inc.*, 58 F.3d 1238, 1240 (8th Cir. 1995) (noting appellate court could not consider district court denial of motion to remand where district court refused Plaintiff's request to certify order for interlocutory appeal).

This Court finds that all three elements required by § 1292(b) are present in this case. The central question considered in whether Philip Morris may remove this lawsuit to federal court under 28 U.S.C. § 1442(a)? The presence of a controlling question of law in this particular order is especially clear. The dispositive question for jurisdictional purposes is whether, given the FTC's regulation of cigarette testing and advertising (which is not in dispute), Philip Morris was acting under the direction of a federal officer as that phrase is used in 28 U.S.C. § 1442(a). The facts surrounding the FTC's involvement with cigarette testing and advertising are not in dispute. This question is purely a legal one.

Additionally, substantial grounds for disagreement with the Court's ruling exist. The Court's decision is directly contrary to the only other federal district court cases that have considered the very same issue. The decisions in *Tremblay* and *Pearson* could not be considered on appeal because 28 U.S.C. § 1447(d) prevents U.S. Courts of Appeal from considering a district court's order remanding a

case to state court on jurisdictional grounds. *See Feidt v. Owens Corning Fiberglas Corp.*, 153 F.3d 124, 126-127. This is so even where a remand order is certified for interlocutory appeal under § 1292(b). *Id.* at 129-130. Further, several other motions to remand removed proposed "Lights" class actions relying on § 1442(a) are pending in federal courts across the country. *See Arnold v. Philip Morris USA*, Case No. 03-403-MJR (S.D.Ill.); *Paldrmic v. Altria Corp. Services*, Case No. 03-C-649 (E.D.Wisc.); *Piscetta v. Philip Morris, Inc.*, Case No. 03-CV-1337-RLV (N.D.Ga.); *Stern v. Philip Morris USA*, Case No. 03cv2556; *Virden v. Altria Group, Inc.*, Case No. 5:03-CV-61 (N.D.Va.).

Finally, certification will "materially advance the termination of this litigation." A strong consideration in considering a § 1292(b) petition is the policy of "minimizing the total burdens of litigation on parties and the judicial system by accelerating or at least simplifying trial court proceedings." *See* 16 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3930, p. 439 (2d. ed.1995). That goal would be advanced here.

This Court concludes that certification of the question posed in the Plaintiffs' motion to remand for interlocutory appeal is appropriate. The Court therefore certifies the controlling question of this order – May Philip Morris remove this lawsuit to federal court under 28 U.S.C. § 1442(a)? – for interlocutory appeal. The Court is mindful that § 1292(b) should only be used in "exceptional cases," but believes that this is one of those cases in which interlocutory appeal could avoid "protracted and expensive litigation." *See White*, 43 F.3d 374 at 376. Therefore, if Plaintiffs so choose, they shall have the statutorily enumerated ten days in which to file an application for interlocutory review with the Eighth Circuit Court of Appeals.[12]

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[12] Failure to file such application within the ten day period would result in loss of the right to petition for interlocutory appellate consideration. *See Jones v. Goodyear Tire & Rubber Co.*, 967 F.2d 514, 516 (11th Cir. 1992).

In this event, Plaintiffs shall also notify this court. To avoid expensive and burdensome proceedings in the district court, the Court orders that the filing of an application for interlocutory appeal with the Eighth Circuit Court of Appeals and notice thereof to this court shall stay the proceedings in this court until the question posed on this interlocutory appeal is adjudicated or the application is rejected.

IT IS THEREFORE ORDERED that the Plaintiffs' Motion to Remand (Doc. # 2) be, and it is hereby, DENIED.

IT IS FURTHER ORDERED that the Plaintiffs' request for costs and fees (Contained in Doc # 2) be, and it is hereby, DENIED.

IT IS FURTHER ORDERED that the controlling question of this case, as stated above, be and it is hereby, DESIGNATED FOR INTERLOCUTORY APPEAL under § 1292(b). The Plaintiffs shall have ten days to file an application for interlocutory review with the Court of Appeals for the Eighth Circuit. Upon filing of such an application, proceedings in this Court will be stayed pending either the outcome of the Eighth Circuit review of the question posed or rejection of the application.

IT IS FURTHER ORDERED that the date on which Defendants' response to Plaintiffs' Motion for Class Certification is due shall be extended. If the stay contemplated above comes into effect, Defendants' response to Plaintiffs' Motion for Class Certification need not be filed until 14 days after Eighth Circuit final action upon Plaintiff's application for interlocutory appeal. If Plaintiffs do not seek interlocutory appeal, Defendants' response is due no later than 14 days after the expiration of the ten day period in which Plaintiffs have to file an application for interlocutory review.

Dated this 12th day of December, 2003.

/s/ Garnett Thomas Eisele
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-1225

LISA WATSON, ET AL.,
Appellants,

v.

PHILIP MORRIS COMPANIES, INC., ET AL.,
Appellees.

Order Denying Petition for Rehearing
and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Arnold and Judge Bye would grant the petition for rehearing en banc.

(5128-010199)

November 18, 2005

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE CIRCUIT COURT
PULASKI COUNTY, ARKANSAS

Case No. CV03-4661

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION, AND PHILIP MORRIS INCORPORATED, A CORPORATION,
Defendants.

[Filed May 29, 2003]

FIRST AMENDED CLASS ACTION COMPLAINT

COMES NOW Plaintiffs, on behalf of themselves and all other similarly situated, by and through their undersigned attorneys, and for their First Amended Class Action Complaint state:

1. Plaintiff Lisa Watson is, and was at all relevant times, residing in Pulaski County, Arkansas.

2. Plaintiff Loretta Lawson is, and was at all relevant times, residing in Pulaski County, Arkansas.

3. Defendant Philip Morris Companies, Inc. ("Philip Morris") is a Virginia corporation with its principal place of business at 120 Park Avenue, New York, NY. At all times relevant hereto, Philip Morris, through its wholly owned subsidiary Philip Morris Incorporated, engaged in the business of manufacturing, promoting, marketing, distributing, and selling Cambridge Lights and Marlboro Lights brand cigarettes. Philip Morris transacts business in Pulaski County, Arkansas, and in all states throughout the United States and at all relevant times manufactured,

promoted, marketed, distributed, and/or sold cigarettes in Arkansas and in all states throughout the United States. Defendant Philip Morris has significant contacts with Pulaski County and the activities complained of herein occurred, in whole or in part, in Pulaski County, Arkansas.

4. Defendant Philip Morris Incorporated ("PMI" or the "subsidiary") is a Virginia corporation with its principal place of business at 120 Park Avenue, New York, NY. PMI is a wholly owned subsidiary of Philip Morris. PMI is a foreign for profit corporation in good standing registered to do business in Arkansas. Its agent for service is The Corporation Company, 425 West Capitol Avenue, Suite 1700, Little Rock, AR 72201. At all times relevant hereto, PMI engaged in the business of manufacturing, promoting, marketing, distributing and selling Cambridge Lights and Marlboro Lights brand cigarettes. PMI transacts business in Pulaski County, Arkansas, and at all times relevant hereto manufactured, promoted, marketed, distributed, and/or sold cigarettes in Arkansas and in all states throughout the United States. Defendant PMI has significant contacts with Pulaski County and the activities complained of herein occurred, in whole or in part, in Pulaski County, Arkansas.

5. Jurisdiction is proper in this court.

6. Venue is proper in this court.

7. Defendants manufacture so-called "lowered tar" filtered cigarette under the brand names Cambridge Lights and Marlboro Lights. Defendants distribute and sell Cambridge Lights and Marlboro Lights in Pulaski County, Arkansas and throughout the State of Arkansas.

8. At all relevant times, Defendants sold and packaged Cambridge Lights and Marlboro Lights as "light" and as having decreased tar and nicotine.

9. While marketing and promoting decreased tar and nicotine deliveries, Defendants designed Cambridge Lights and Marlboro Lights to register lower levels of tar and nicotine on the "Cambridge" or "Ogg" testing apparatus – the testing machine used by the tobacco industry to

"measure" tar and nicotine levels in cigarettes – than would be delivered to the consumers of the product. Defendants controlled the tar and nicotine delivery of Cambridge Lights and Marlboro Lights cigarettes under machine testing conditions apparently to achieve support for their representations that their Cambridge Lights and Marlboro Lights cigarettes are "light" and contain decreased tar and nicotine and that their Marlboro Lights cigarettes contain "lowered tar and nicotine."

10. Defendants' representations that Cambridge Lights and Marlboro Lights cigarettes are "lighter" (i.e. lower tar and nicotine) than regular cigarettes are deceptive and misleading and constitute unfair business practices.

11. Not only do consumers receive higher levels of tar and nicotine than the testing apparatus registers, but the smoke produced by Cambridge Lights and Marlboro Lights is more mutagenic (causing genetic and chromosomal damage) per milligram of tar than 'regular' cigarettes.

12. Defendants engaged in a common course of unfair business practices and/or deceptive and unlawful conduct in connection with the manufacture, distribution, promotion, marketing, and sale of Cambridge Lights and Marlboro Lights cigarettes by:

a. Falsely and/or misleadingly representing that their product is "light" and/or delivers lowered tar and nicotine in comparison to regular cigarettes;

b. Describing the product as light when the so-called lowered tar and nicotine deliveries depended on deceptive changes in cigarette design and composition that dilute the tar and nicotine content of smoke per puff as measured by the industry standard testing apparatus, but not when used by the consumer;

c. Intentionally manipulating the design and content of Cambridge Lights and Marlboro Lights cigarettes in order to maximize nicotine delivery while falsely and/or deceptively claiming lowered tar and

nicotine. These manipulations include, but are not limited to, the modification of tobacco blend, weight, rod length, and circumference; the use of reconstituted tobacco sheets and/or expanded tobacco; and the increase of smoke pH levels by chemical processing and additives, such as ammonia, which resulted in the delivery of greater amounts of tar and nicotine when smoked under actual conditions than Defendants represent by use of the "light" description;

d. Employing techniques that purportedly reduce machine-measured levels of tar and nicotine in Cambridge Lights and Marlboro Lights cigarettes, while actually increasing the harmful biological effects, including mutagenicity (genetic and chromosomal damage) caused by the tar ingested by the consumer per milligram of nicotine.

13. Through longstanding fraudulent and unfair conduct, Defendants willfully deceived consumers, including the Plaintiffs named herein, regarding the nature and effect of their "light" cigarettes.

14. Plaintiff Lisa Watson has purchased and consumed (on average) approximately one and a half packs of Marlboro Lights cigarettes per day for approximately six years. Plaintiff was without knowledge of the conduct by Defendants alleged in this Complaint, or of any facts from which it might reasonably be concluded that Defendants were so acting, or which would have lead to the discovery of such action, until early 2000.

15. Plaintiff Loretta Lawson has purchased and consumed (on average) approximately one pack of Marlboro Lights cigarettes per day for approximately seven years. Plaintiff was without knowledge of the conduct by Defendants alleged in this Complaint, or of any facts from which it might reasonably be concluded that Defendants were so acting, or which would have lead to the discovery of such action, until early 2000.

16. Defendants have unfairly and unjustly profited from the deceptive and misleading representations regarding their so-called "light" cigarettes.

Class Action Allegations

17. Plaintiffs bring this action as a Class Action against Defendants pursuant to § 4-88-107 *et seq.*, of the Arkansas Deceptive Trade Practices Act individually and on behalf of a Class consisting of all persons who purchased Defendants' Cambridge Lights and Marlboro Lights cigarettes in Arkansas for personal consumption.

18. The Class period commences on the first date the Defendants placed their Cambridge Lights and Marlboro Lights cigarettes into the stream of commerce through the date the Court certifies this suit as a Class Action.

19. Excluded from the putative Class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants, and the immediate family members of any such person. Also excluded is any judge who may preside over this cause.

20. Plaintiffs are members of the Class and they will fairly and adequately assert and protect the interests of the Class. The interests of the Plaintiffs are coincident with, and not antagonistic to, those of other members of the Class. Plaintiffs have retained attorneys who are experienced in Class Action litigation.

21. Members of the Class are so numerous that joinder of all members is impracticable. Upon information and belief, there are millions of members of the Class whose identities can be ascertained from the records and files of Defendants and from other sources.

22. Common questions of law or fact predominate over any questions affecting only individual members of the Class. Common questions include, but are not limited to, the following:

a. Whether Defendants misrepresented the actual tar and nicotine delivery to consumers of "light" ciga-

rettes they manufactured, marketed, and/or distributed;

b. Whether Defendants intentionally designed "light" cigarettes to register misleading tar and nicotine measurements on the testing apparatus utilized by the tobacco industry while delivering significantly higher quantities of tar and nicotine to human smokers;

c. Whether the Defendants violated the Arkansas Deceptive Trade Practices Act through their course of unfair and/or deceptive conduct as alleged herein;

d. Whether Defendants' conduct in violation of the Arkansas Deceptive Trade Practices Act was willful and wanton;

e. Whether the Defendants were unjustly enriched at the expense of the Class Members; and

f. Whether the Class has been damaged and, if so, the extent of such damages.

23. The prosecution of separate actions by individual members of the Class would create a risk of:

a. Inconsistent or varying adjudications with respect to individual members of the Class; and

b. Adjudication with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interest.

24. The Class Action method is appropriate for the fair and efficient prosecution on of this action.

25. Individual litigation of all claims which might be assessed by all Class Members would produce such a multiplicity of cases that the judicial system having jurisdiction of the claims would remain congested for years. Class treatment, by contrast, provides manageable judicial treatment calculated to bring a rapid conclusion to all litigation of all claims arising out of the conduct of Defendants.

26. The certification of a Class would allow litigation of claims that, in view of the expense of the litigation, may be insufficient in amount of damages to allow prosecution separate, individual actions.

27. Accordingly, Plaintiff brings this action on behalf of themselves and on behalf of all other members of the Class defined as follows:

> All persons who purchased Defendants' Marlboro Lights and Cambridge Lights cigarettes in Arkansas for personal consumption, from the first date that the Defendants sold Marlboro Lights and Cambridge Lights in Arkansas through the date the Class is certified.
>
> Excluded from the Class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants, or employees of Defendants, and the immediate family members of such persons. Also excluded is any trial judge who may preside over this cause.

COUNT I

COMES NOW Plaintiffs and for Count I of their Complaint against Defendants PHILIP MORRIS COMPANIES, INC., and PHILIP MORRIS INCORPORATED alleges:

28. Plaintiffs Lisa Watson and Loretta Lawson restate and reallege the allegations contained in Paragraphs 1 through 27 as if fully set out herein.

29. The acts of Defendants constitute violations of the Arkansas Deceptive Trade Practices Act, § 4-88-107 *et seq.*

30. At all times relevant hereto, Plaintiffs and Defendants PHILIP MORRIS COMPANIES, INC., and PHILIP MORRIS INCORPORATED were "persons" within the meaning of § 4-88-102(4).

31. At all times relevant hereto, Plaintiffs and members of the Class were consumers within the meaning of § 4-88-107 and applicable case law.

32. At all times material hereto, Defendants PHILIP MORRIS COMPANIES, INC., and MORRIS INCORPORATED conducted trade and commerce and sold goods within the meaning of § 4-88-107.

33. The Arkansas Deceptive Trade Practices Act, § 4-88-107(a) provides in pertinent part:

> Deceptive and unconscionable trade practices generally:
>
> (1) Knowingly making a false representation as to the characteristics, ingredients, uses, benefits, alterations, source, sponsorship, approval, or certification of goods or services, or as to whether g1oods [*sic*] are original or new, or of a particular standard, quality, grade, style, or model;
>
> (10) Engaging in any other unconscionable, false, or deceptive act or practice in business, commerce, or trade.

34. Beginning with the first date that Defendants placed their Cambridge Lights and Marlboro Lights cigarettes into the stream of commerce and continuing through the present, Defendants, individually and/or jointly, by and through their employees, agents and/or brokers, engaged in misrepresentations, unlawful schemes and courses of conduct intended to induce the Plaintiffs and members of the Class to purchase Defendants' Cambridge Lights and Marlboro Lights cigarettes through one or more of the following unfair and/or deceptive acts and/or practices:

a. Falsely and/or misleading representation that their product is "light" and/or delivers "lowered tar and nicotine" in comparison to regular cigarettes;

b. Designing cigarettes to register lowered tar and nicotine levels under machine testing conditions while actually delivering higher levels of the compounds when smoked by consumers, thereby rendering the "light" product descriptor deceptive and misleading;

c. Placing ventilation holes on the filter of light cigarettes that are covered or blocked by the smoker's

lips or fingers under normal use, thereby negating the represented effects of the light brand;

d. Manipulating the nicotine levels in their light cigarettes;

e. Employing techniques that purportedly reduce machine-measured levels of tar in their Cambridge Lights and Marlboro Lights cigarettes, including increased air dilution through the use of ventilation holes in or near the filter, but which actually increase the mutagenicity (genetic and chromosomal damage) of tar delivered to the consumer and thereby increase the levels of harmful toxins per milligram of nicotine by the consumer; and

f. Manipulating the design of their Cambridge Lights and Marlboro Lights cigarettes, including but not limited to, modifying the tobacco blend, weight, rod length and circumference; increasing smoke pH levels by chemical processing and additives, such as ammonia, in such a way that resulted in delivery of greater amounts of tar and nicotine when smoked under actual conditions than Defendants represent by use of the "light" product descriptor.

35. The facts which Defendants misrepresented as alleged in the preceding paragraph were material in that they concerned facts that would have been important to a reasonable consumer in making a decision whether to purchase Cambridge Lights and/or Marlboro Lights cigarettes.

36. Defendants' conduct as alleged in paragraph 34 was unfair in that (1) it offended public policy; (2) it was immoral, unethical, oppressive, or unscrupulous; and/or (3) it caused substantial economic injury to consumers, namely Plaintiff.

37. Defendants' "unfair" and/or deceptive acts and/or practices alleged in the preceeding paragraph occurred in connection with Defendants' conduct of trade and commerce in Arkansas.

38. Defendants intended for Plaintiffs and members of the Class to purchase Defendants' Cambridge Lights and Marlboro Lights cigarettes in reliance upon Defendants' unfair and/or deceptive acts and/or practices in the marketing and sale of their Cambridge Lights and Marlboro Lights cigarettes.

39. Defendants' unfair and/or deceptive acts and/or practices were committed with willful and wanton disregard for whether or not Plaintiffs and members of the Class would actually receive less tar and nicotine than they would have from a regular cigarette.

40. Defendants' unfair and/or deceptive acts and/or practices violate the Arkansas Deceptive Trade Practices Act, § 4-88-107.

41. As a direct and proximate result of the Defendants' unfair and/or deceptive acts and/or practices, Plaintiffs and members of the Class were damaged in that Plaintiffs and members of the Class did not receive "light" (lower tar and nicotine) cigarettes when they purchased Marlboro Lights cigarettes.

42. Plaintiffs and members of the Class have suffered actual damages in an amount to be proven at trial, but less than $75,000 per plaintiff or Class Member, including all compensatory damages, punitive damages, attorneys' fees and costs.

COUNT II

COMES NOW Plaintiffs Lisa Watson and Loretta Lawson and for Count II of their Complaint against Defendants PHILIP MORRIS COMPANIES, INC., and PHILIP MORRIS INCORPORATED alleges:

43. Plaintiffs Lisa Watson and Loretta Lawson reallege the allegations contained in paragraphs 1 through 42 as if fully set out herein.

44. As stated with more particularly above, Defendants embarked on and carried out a common scheme of marketing and selling light cigarettes by falsely and deceptively representing that the cigarettes were "Lights," or contained "lowered tar and nicotine."

45. Defendants' practices resulted in Plaintiffs and members of the Class purchasing light cigarettes in order to receive a low tar, low nicotine alternative to regular cigarettes, but not getting the perceived benefits of less tar and nicotine than regular cigarettes.

46. Defendants' practices further resulted in Plaintiffs and members of the Class purchasing light cigarettes without understanding the true nature of Defendants' product or that Defendants manipulated their Cambridge Lights and Marlboro Lights cigarettes to increase their own ill-gotten profits.

47. The monies paid by Plaintiffs and members of the Class to Defendants in the purchase of Cambridge Lights and Marlboro Lights cigarettes conferred substantial benefits upon Defendants. Defendants knew of and appreciated the benefits conferred upon them by Plaintiffs and the Class and accepted and retained these benefits, which, injustice and fairness, should be refunded and paid over to Plaintiffs and members of the Class in an amount to be proven at trial but less than $75,000 per Plaintiff or Class Member.

WHEREFORE, Plaintiffs and the Class pray that the Court enter judgment in their favor and against Defendants PHILIP MORRIS COMPANIES, INC., and PHILIP MORRIS INCORPORATED as follows:

A. Ordering that this action be maintained as a Class Action, pursuant to Ark. R. Civ. P. 23 and the following Class be certified:

> All persons who purchased Defendants' Marlboro Lights and Cambridge Lights cigarettes in Arkansas for personal consumption, from the first date that the Defendants sold Marlboro Lights and Cambridge Lights in Arkansas through the date this Class is certified.
>
> Excluded from the Class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as wall as the officers, directors, agents, servants, or employees of Defendants, and the immedi-

ate family members of such persons. Also excluded is any trial judge who may preside over this cause.

B. Awarding Plaintiff and members of the Class compensatory damages, punitive damages, costs of suit, and attorneys' fees in an amount less than $75,000 per Plaintiff or Class Member.

C. Plaintiffs and members of the Class demand a jury trial on the issues.

Respectfully submitted,

CAULEY GELLER BOWMAN & RUDMAN, LLP

/s/ S. GENE CAULEY
S. Gene Cauley # 94012
Steven A. Owings # 89035
11001 Executive Center Drive
Suite 200
Little Rock, AR 72211
P.O. Box 25438
Little Rock, AR 72221
Telephone: 501/312-8500
Facsimile: 501/312-8505

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

Case No. 4:03-CV-519 GTE

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

PHILIP MORRIS COMPANIES, INC., AND PHILIP MORRIS INCORPORATED,
Defendants.

[Filed July 2, 2003]

NOTICE OF REMOVAL

Defendant Philip Morris USA Inc. (hereinafter, "PM USA") (sued as "Philip Morris Incorporated") hereby gives notice of removal of the civil action captioned *Watson v. Philip Morris*, Case No. CV03-4661, from the Circuit Court, Pulaski County to the United States District Court for the Eastern District of Arkansas. PM USA files this notice of removal pursuant to 28 U.S.C. §§ 1331, 1441(a)(1) and 1446.

As grounds for removal, PM USA states as follows:

1. PM USA received a copy of the complaint on June 3, 2003. The only other named defendant, Philip Morris Companies Inc. (now known as "Altria Group, Inc."), has not been served with the complaint.

2. This notice of removal is filed within thirty days of receipt by PM USA of the complaint. Removal is therefore timely pursuant to 28 U.S.C. § 1446(b).

3. PM USA has not pled, answered, or otherwise appeared in the state court action.

4. Written notice of the filing of this Notice of Removal and of the removal of this action has been delivered to all parties through their counsel of record. A copy of the Notice of Removal will be filed promptly with the Clerk of the Court of the Circuit Court, Pulaski County, Arkansas.

5. Removal is proper under 28 U.S.C. § 1442(a)(1)'s federal officer provision, for the reasons stated below in ¶¶ 6-51, and because the Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331, as described in ¶¶ 52-59 below.

FEDERAL OFFICER REMOVAL

6. Plaintiff brings a putative class action on behalf of all persons who purchased Cambridge Lights and Marlboro Lights cigarettes in Arkansas. Compl. at ¶ 27. At the heart of plaintiff's complaint is the Federal Trade Commission's ("FTC") mandated testing system for measuring tar and nicotine yields for all cigarettes (including Marlboro Lights and Cambridge Lights). According to plaintiffs, the FTC's "testing apparatus" produces inaccurate results regarding levels of tar and nicotine and the mutagenicity of the smoke inhaled by Cambridge Lights and Marlboro Lights smokers: "Not only do consumers receive higher levels of tar and nicotine than the testing apparatus registers, but the smoke produced by Cambridge Lights and Marlboro Lights is more mutagenic . . . per milligram than 'regular' cigarettes." *Id.* at ¶ 11. Plaintiffs contend that PM USA's compliance with FTC testing requirements "resulted in Plaintiffs and members of the Class purchasing light cigarettes in order to receive low tar, low nicotine alternative to regular cigarettes, but not getting the perceived benefits of less tar and nicotine than regular cigarettes." *Id.* at ¶ 45.

7. Plaintiffs allege that defendants engaged in misconduct by "representing that their product is 'light' and/or deliver lowered tar and nicotine in comparison to 'regular' cigarettes." *Id.* at ¶ 12(a). Plaintiffs premise liability on the contention that tar and nicotine content of

smoke per puff is diluted when measured by the "industry standard testing apparatus" as compared to when cigarettes are smoked by consumers. *Id.* at ¶ 12(b).

8. The FTC, however, directed PM USA to determine tar and nicotine yields by using the very method that plaintiff assert is misleading and should give rise to liability. Removal is therefore proper pursuant to 28 U.S.C. § 1442(a)(1), which provides in relevant part:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office.

9. Section 1442(a)(1) provides a private party with the right to remove to federal court where it is sued for actions taken under the direction of a federal officer. As numerous courts – including courts in this Circuits – have made clear, "the right of removal conferred by § 1442(a)(1) is to be broadly construed," and thus "[t]he Supreme Court has explicitly endorsed a broad reading of § 1442 rather than 'a narrow, grudging interpretation.'" *Ferrell v. Yarberry*, 848 F. Supp. 121, 122 (E.D. Ark. 1994) (quoting *Arizona v. Manypenny*, 451 U.S. 232 (1981)); *Hardge-Harris v. Pleban*, 741 F. Supp. 764, 771 (E.D. Mo. 1990); *see also Kolibash v. Comm. on Legal Ethics of the West Virginia Bar*, 872 F.2d 571, 576 (4th Cir. 1989); *Nationwide Investors v. Miller*, 793 F.2d 1044, 1045-46 (9th Cir. 1986) (per curiam) (quoting *Willingham v. Morgan*, 395 U.S. 402, 407 (1969)); *Swett v. Schenk*, 792 F.2d 1447, 1450 (9th Cir. 1986) (same); *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398 (5th Cir. 1998) (same); *Puerto Rico v. Casillas*, 624 F. Supp. 822, 826 (D.R.P. 1985) ("Section 1442 receives a liberal construction."); *514*

Citizens & Taxpayers v. Fecteau, 269 F. Supp. 769, 770 (D.N.H. 1966) ("In order to effectuate the propose of this statute, it must be liberally construed."). Underlying this broad application of section 1442(a)(1) is a concern "that state court suits against corporations [acting under the direction of federal officers] could be a direct interference with the implementation of federal law." *Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 946 (E.D.N.Y. 1992); *see also Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 487 (1st Cir. 1989) ("Section 1442(a)(1) represent[s] a legislatively-spawned value judgment that a federal forum should be available when particular litigation implicates a cognizable federal interest").

10. Courts have articulated a four-prong test to determine whether removal under section 1442(a)(1) is proper. Under this test, the removing party must show that:

- it "acted under the direction of a federal officer";
- it can "raise a federal defense to plaintiff's claims";
- it can "demonstrate a causal nexus between plaintiff's claims and acts it performed under color of federal office";
- it is a "person" within the meaning of the statute.

Pack v. AC and S, Inc., 838 F. Supp. 1099, 1101 (D. Md. 1993); *Fung v. Abex Corp.*, 816 F. Supp. 569, 571-72 (N.D. Cal. 1992).

A. FTC's Tar and Nicotine Program

11. The long history of the FTC's extensive involvement in the subject matter of this lawsuit establishes that these four requirements are met here. The FTC has required without exception that its standardized testing method be used in measuring tar and nicotine and that its method must form the basis for all communications regarding tar and nicotine levels.

1. Beginnings of the FTC's Tar and Nicotine Program

12. The FTC has broad regulatory and enforcement powers over cigarette advertising and has not hesitated to

exercise these powers. In addition to the FTC's general authority to prevent deceptive advertising practices, Congress has ensured through the Federal Cigarette Labeling & Advertising Act, 15 U.S.C. § 1331 *et seq.* (FCLAA), that the FTC has extensive authority to monitor and regulate virtually all aspects of cigarette advertising. FCLAA requires the FTC to report annually to Congress regarding the advertising and promotion of cigarettes. 15 U.S.C. 1337(b) (requiring annual reports). And FCLAA specifically provides that the FTC retains authority "with respect to unfair or deceptive acts or practices in the advertising of cigarettes." 15 U.S.C. § 1336. As the Supreme Court has explained, these provisions make clear that "to the extent that Congress contemplated additional targeted regulation of cigarette advertising" beyond those specific regulations set forth in FCLAA, "it vested that authority in the FTC." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 548 (2001).

13. The FTC began its involvement in tar and nicotine measurements and disclosures as early as the 1940s.

14. Between 1941 and 1950, the FTC investigated and prosecuted complaints against at least four major tobacco companies for advertising the tar or nicotine content of cigarettes. *See, e.g., In re Benson & Hedges*, 33 F.T.C. 1659 (1941); *In re R.J. Reynolds*, 46 F.T.C. 706 (1950); *In re P. Lorillard*, 46 F.T.C. 735 (1950); *In re Am. Tobacco*, 1951 F.T.C. LEXIS 61 (1951) *In re P. Lorillard*, No. 7692, 1959 U.S. App. LEXIS 5376 (1959).

15. In September 1955, the FTC followed up this litigation by issuing the Cigarette Advertising Guides and directing the tobacco companies to follow the guidelines. Among other things, the 1955 Guides barred the tobacco companies from claiming that "any brand of cigarettes or the smoke therefrom is low in nicotine or tars, or contains less, nicotine [or] tars . . . than any other brand or brands of cigarettes when it has not been established by competent scientific proof at the time of dissemination that the claim is true." 1955 Cigarette Advertising Guides, Trade Regulation Reporter ¶ 39,012 at 41,602 (CCH 1995).

16. In December 1959, the FTC directed the tobacco industry to cease making any representations of "low or reduced tar" on the ground that they were health claims. As the chairman of the FTC subsequently explained, the FTC would take action to enforce this directive:

> [The Guides] constituted, in effect, informal advice and guidance to industry with respect to the regulatory posture which the Commission had reason to believe would be established as a basis for issuance of complaints, and subsequent proceedings under Section 5(B) of the Federal Trade Commission Act. . . .
>
> In 1960, then, the Commission was informing the industry that in its opinion the evidence then available would support a complaint against any marketer who made any reference to tar and nicotine content, charging that such a reference was false and misleading.

Letter from Chairman Paul Rand Dixon to the Honorable Warren G. Magnuson at 2-3 (April 11, 1966).

2. Establishment of the FTC's Testing Program

17. In the 1960s, the FTC's prohibition of all tar and nicotine advertising came under substantial criticism from the public health community, which was beginning to recommend reductions in tar and nicotine levels as a possible means of reducing the risks of smoking.

18. Based on the recommendations of the public health community, in March 1966, the FTC reversed its position regarding the disclosure and advertising of tar and nicotine levels. The FTC directed each of the major tobacco manufacturers (including PM USA) that "a factual statement of the tar and nicotine content (expressed in milligrams) of the mainstream smoke from a cigarette would not be in violation" of the 1955 Guides. 1955 Cigarette Advertising Guidelines, Trade Regulation .Reporter ¶ 39,012, at 41,603 (CCH 1995). The Commission subsequently explained that this decision to "augment information available to the public on the tar and nicotine content of cigarettes" was "[b]ased on the proposition that lower

yield cigarettes present a lessened hazard to the American public." 1968 FTC Report to Congress Pursuant to the FCLAA at 17.

19. At the same time, however, the FTC took action to ensure that all tar and nicotine measurements were based on a standardized, uniform testing method established and maintained by the government. The FTC directed that cigarette manufacturers could disclose only those tar and nicotine measurements that were "supported by adequate records of tests conducted in accordance with the Cambridge Filter Method." 1955 Cigarette Advertising Guidelines, Trade Regulation Reporter ¶ 39,012, at 41,603 (CCH 1995). The Commission admonished that "statements or representations" of tar and nicotine content "based on non-standardized tests having no official or governmental sanction would tend to confuse and mislead the public." Letter from Joseph W. Shea to Howard H. Bell at 3 (Oct. 25, 1967). As the FTC subsequently explained, its "tar and nicotine testing program was intended to provide smokers seeking to switch to lower tar cigarettes with a single, standardized measurement with which to chose [*sic*] among the then-existing brands." 1997 FTC Annual Report to Congress Pursuant to the FCLAA at 4.

20. Accordingly, the FTC issued a notice seeking comment as to "what action, if any, should be taken in the public interest with respect to modifying or amplifying the Cambridge Filter Method" and announced that it would hold a hearing on the subject. Methods to Be Employed in Determining Tar and Nicotine Content; Notice of Public Hearing, 31 Fed. Reg. 14278 (Nov. 4, 1966). Members of the tobacco industry (including PM USA) made a submission specifically warning of the limitations of the FTC's proposed testing methodology:

> The [Cambridge] Method does *not* measure the *volume* of smoke – or the PM ["particulate matter"] or nicotine in the volume of smoke – that any *human being* will draw from smoking any particular cigarette.

> Each smoking characteristic is leveled or averaged out by the standard method.
>
> No two human smokers smoke in the same way. No individual smoker always smokes in the same fashion . . .
>
> The [Cambridge] Method does not and cannot measure these many variations in human smoking habits.

Supplemental Observations Following November 30, 1966 Hearing Before the Federal Trade Commission at 2-3 (emphasis in original).

21. Notwithstanding the recognized limitations in the method, the FTC directed that the Cambridge method be retained as the only allowable method for measuring tar and nicotine. The method subsequently became known as the "FTC method," and has formed the centerpiece of the FTC's entire tar and nicotine program.

22. On August 1, 1967, the FTC "issu[ed] directions to its staff" in the *Federal Register* "to commence the first formal test" of tar and nicotine measurements under its new standardized methodology. Testing for Tar and Nicotine Content, 32 Fed. Reg. 11178 (Aug. 1, 1967). The FTC dictated the precise testing conditions to be used, including:

1. Smoke cigarettes to a 23 mm. butt length, or to the length of the filter and overwrap plus 3 mm. if in excess of 23 mm.,
2. Base results on a test of 100 cigarettes per brand, or type,
3. Cigarettes to be tested will be selected on a random basis, as opposed to "weight selection,"
4. Determine particulate matter on a "dry" basis employing the gas chromatography method . . . to determine the moisture content,
5. Determine and report the "tar" content after subtracting moisture and alkaloids as nicotine from the particulate matter,

6. Report tar content to the nearest whole milligram and nicotine content to the nearest 1/l 0 milligrams.

Id.

23. Testing began in the FTC's own laboratories in 1967 – four years before Marlboro Lights were introduced on the market. This is the only instance in the Commission's history in which it has conducted in-house testing of a consumer product.

24. At the same time that it began formal testing the FTC issued a press release announcing the adoption of its testing program and explaining its decision. The FTC again directed that its testing method was the only one to be used in measuring tar and nicotine: "the public interest requires that all test results presented to the public be based on a uniform method" because "use of more than one testing method . . . would only serve to confuse or mislead the public." "FTC To Begin Cigarette Testing," FTC Press Release at 1-2 (Aug. 1, 1967). The Commission explained that it adopted the Cambridge method to be the "uniform method" because it provides a "reasonable standardized method" that was "capable of being presented to the public in a manner that is readily understandable." *Id.* at 1. Finally, the FTC promised that it would "continue evaluating its tests, and on that basis may determine in the future to change the number of cigarettes tested or any other testing procedures as may be found necessary." *Id.* at 2-3.

25. In addition to conducting the testing in its own laboratory, the FTC also publicly reported the results of its testing. Publication of FTC official tar and nicotine ratings began in 1967. Since then, the FTC has published its official tar and nicotine ratings on a periodic basis in the *Federal Register* and in the free-standing Tar and Nicotine Report.

3. Transfer of Testing Responsibility to the Industry

26. The FTC continued to conduct tar and nicotine measurements in its own laboratories until 1987. At that

point, the FTC ordered the Tobacco Institute Testing Laboratory ("TITL") – an industry-funded laboratory – to assume responsibility for the tar and nicotine measurements.

27. In transferring measurement responsibility to the industry, the FTC insisted on maintaining strict control over every detail of the testing process. The FTC gave TITL no discretion whatever in conducting the test; the FTC dictated the precise conditions of the testing. The Commission required that all TITL test results must be reported to the Commission by sworn affidavit, thereby subjecting any inaccurate reporting to penalties of perjury. And the FTC retained the right to conduct unlimited inspections of TITL laboratories to ensure that the industry's testing properly adhered to the FTC's precise specifications.

4. Reconsideration of the FTC Method

28. Since adopting its tar and nicotine measurement program in 1967, the FTC has continually re-evaluated the propriety of its system. On each occasion, the FTC's re-assessment was prompted by concerns regarding the limitations of its method for predicting the actual levels of tar and nicotine that are delivered to individual smokers. On each occasion, the FTC requested and received comments from a number of prominent scientists and public health authorities. And on each occasion, the FTC directed that the testing program be retained and refused to allow the use of any other testing method. As a result, the FTC requires the same standard to be used today.

29. As the FTC has explained in deciding to retain its existing system: "[a]lthough smokers may not smoke precisely like the FTC machine, by using standardized smoking parameters the FTC ratings provide an *objective* and *comparative* basis for assessing the amount of "tar" and nicotine a smoker will get from different cigarettes if that person smokes each cigarette in the same way." Federal Trade Commission's Trial Brief, *Federal Trade Commission v. Brown & Williamson Tobacco Corp.*, Civil Action

No. 83-1940, in the United States District Court for the District of Columbia (Sept. 12, 1983) at 5-6 (emphasis in original).

30. Moreover, at times the FTC has specifically determined that there was scientific evidence supporting the retention of its testing system. For example, as the FTC's Bureau of Consumer Protection has explained, the FTC declined to revise its method after a 1983 investigation in light of existing epidemiologic evidence suggesting that the testing system had value in predicting lung cancer risk for smokers:

> [T]here was no clear consensus as to specific action the Commission could (or should) take to eliminate the limitations of the test method. At the same time, *abandoning the testing system without instituting another method of tar testing would have been premature because then-current epidemiologic evidence suggested that there had been a reduction in lung cancer deaths that might be attributable to declines in average tar levels that had occurred since the 1950s.*

C. Lee Peeler, "Cigarette Testing and the Federal Trade Commission: A Historical Overview," in *Monograph 7: The FTC Cigarette Test Method for Determining, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes* at 7 (1996) (emphasis added).

31. Thus, based on careful considerations of the available evidence, the FTC has repeatedly required the industry to use the FTC method as the standardized procedure for measuring tar and nicotine yields. And the FTC has repeatedly made clear that *only* the FTC method should be used. For instance, as the FTC direct in a letter to one tobacco manufacturer, "it would be deceptive to advertise a tar-figure which is higher than the latest applicable FTC tar figure. . . . tar values which are set forth in cigarette advertisements must be consistent with the latest applicable FTC tar number." Letter from Carol M. Thomas to Michael I. Gastman (Sept. 26, 1978).

5. Tar and Nicotine Disclosures

32. The FTC's tar and nicotine testing program also has provided the basis for the FTC's directions regarding communications with the public about tar and nicotine levels.

a. Requiring Tar and Nicotine Disclosures

33. By 1960, the FTC had reached an agreement with the industry prohibiting tar and nicotine disclosures. In 1966, the FTC reversed this ban and directed that disclosures would be permissible so long as the measurements were determined by the FTC's own testing system. *See supra* at ¶ 18.

34. Three years after beginning its testing program, the FTC went a step further and proposed a trade rule requiring the disclosure of tar and nicotine ratings in cigarette advertisements. In justifying its proposal, the FTC explained that "responsible medical opinion indicates that the reduction of tar and nicotine content in cigarette smoke decreases the hazard to the health" and thus "[t]o promote the public interest, advertisers should not be discouraged from promoting these varieties which rank low in tar and nicotine." 1970 FTC Report to Congress Pursuant to the Public Health Cigarette Smoking Act at 14. The FTC believed that requiring tar disclosures would "lead those smokers who are unable to kick the habit to greater interest in obtaining a low tar and nicotine cigarette" and would encourage "competition among the cigarette companies to meet that interest." *Id.* at 15.

35. After proposing this regulation, the FTC sent a letter to the tobacco industry indicating its determination "to explore . . . the possibility of reaching an agreement with all of the cigarette manufacturers on the inclusion of a statement of tar and nicotine contents in cigarette advertising," so long as the agreement would include an "effective method of insuring compliance with the terms of any agreement." Letter from FTC to Horace R. Kornegay (Sept. 16, 1970). In response, five major tobacco manufacturers (including PM USA) submitted a written plan to

the FTC agreeing require tar and nicotine disclosures in advertising, and the FTC suspended its proposed trade rule indefinitely. Thus FTC determined that relying on the industry's plan to mandate tar and nicotine disclosures would free its resources to pursue other matters, and at the same time made clear that it would return to the proposed trade rule if necessary to ensure that tar and nicotine disclosures were required:

> It appears to be in the public interest to afford the tobacco industry an opportunity to implement the letter and spirit of the amended plan which it has proposed. In taking this action, the Commission is retaining the unconditional right to reschedule the trade regulation rule proceedings and to take any other action relating to this subject at any time it deems such action to be necessary, or desirable in the public interest.
>
> The Commission believes that if the amended plan operates satisfactorily, the Commission will be able to employ substantial manpower and funds which would otherwise have been devoted to hearings and court proceedings to dealing with the serious problems relating to cigarette advertising.

1970 FTC Report to Congress Pursuant to the Public Health Cigarette Smoking Act at 19 (quoting Dec. 22, 1970 press release, Appendix D).

36. As a result of this agreement, PM USA has been required to include tar and nicotine disclosures in all advertising for its cigarettes.

b. FTC's Consideration of Descriptors

37. The FTC's formal testing program – and the tar and nicotine measurements that the testing program generates – also have formed the basis of the FTC's directions regarding the use of descriptors such as "low tar."

38. As early as 1968 – only one year after it commenced its testing program – the FTC began to classify "low" yield cigarettes as those with less than 15 mg of tar as measured by its own testing program. Since then, the FTC has directed that this 15 mg dividing line should

serve as the formal definition of a "low tar" cigarette: "The FTC formally defines a low 'tar' cigarette as one that has 15.0 or less milligrams of 'tar.'" FTC Staff Report, Cigarette Advertising Investigation at 1-50 n. 175 (May 1981); *see also* 1979 FTC Report to Congress at 11; 1980 Report to Congress at 18.

39. In addition, the FTC deliberately decided to allow the tobacco manufacturers to use descriptors such as "low tar," but only under certain defined conditions. The tobacco companies could use descriptors only if the terms were based on the FTC's mandated testing methodology.

40. For example, in 1969, the FTC issued a complaint against American Brands for its advertisements of Pall Mall Gold cigarettes. American Brands claimed that Pall Mall Gold were "lower in tar than ever before. Lower in tar than the best selling filter king . . . the average puff gives you 26% less 'tar' than a non-filter cigarette." *In re Am. Brands*, 79 F.T.C. 255, 257 (1971). The FTC determined that these claims were false and deceptive because Pall Mall Gold cigarettes fell within the middle of its tar and nicotine rankings. *Id.* at 256-57. The investigation ultimately resulted in the entry of a consent order with American Brands. In this consent decree, the FTC mandated that the manufacturer could use terms such as "low," 'lower," "reduced," and "like qualifying terms," so long as the statement was "accompanied by a clear and conspicuous disclosure of . . . the 'tar' and nicotine content in milligrams in the smoke produced by the advertised cigarette." *Id.* at 258-59.

41. The FTC reaffirmed this decision in a 1994 consent agreement with American Tobacco. In 1994, the FTC challenged American's Carlton advertisements, which represented that "consumers will get less tar by smoking 10 packs of Carlton than by smoking a single pack of the other brands shown in the ads, each of which was rated as having more than 10 milligrams of tar per cigarette." *In the Matter of the American Tobacco Company*, Docket No. C-3547, Order and Complaint (Jan. 3, 1995). The Commission found that these advertisements were deceptive

and entered into a consent agreement with American Tobacco prohibiting such comparative claims. *Id.* At the same time, however, the FTC specifically determined that American Tobacco could make "express or implied representation[s] . . . that [its] brand is 'low,' 'lower,' or 'lowest' in tar and/or nicotine." *Id.*

* * *

42. In view of the FTC's mandated tar and nicotine program, PM USA satisfies each of the four prongs necessary for federal officer removal, as discussed below.

B. PM USA Acted Under the Direction of the FTC

43. To satisfy the "acting under" prong, the removing party must generally show that the federal official exercised "'direct and detailed control' over the defendant." *Fung*, 816 F. Supp. at 572 (citation omitted); *see also Pack v. AC and S, Inc.*, 838 F. Supp. 1099, 1103 (D. Md. 1993) (same). Such "control" can be "satisfied by strong government intervention and the threat that a defendant will be sued in state court 'based upon actions taken pursuant to federal direction.'" *Fung*, 816 F. Supp. at 572 (citation omitted). Although merely "participat[ing] in a regulated industry" is typically not sufficient, courts have permitted removal where the defendants, were "governed by 'exceedingly complex regulations, guidelines, and evaluation schemes.'" *Id.* (quoting *Gurda Farms, Inc. v. Monroe County Legal Assistance Corp.*, 358 F. Supp. 841 (S.D.N.Y. 1973)); *see also Ryan*, 781 F. Supp. at 947 (removal proper where based on "showing that the particular conduct being sued upon is closely linked to detailed and specific regulations") (citing *Bakalis v. Crossland Sav. Bank*, 781 F. Supp. 140, 144-45 (E.D.N.Y. 1991)).

44. The 60-year history of FTC mandates discussed above illustrates the FTC's "strong government intervention" and its exercise of "direct and detailed control" over PM USA with respect to tar and nicotine measurements and disclosures. *Fung*, 816 F. Supp. at 572. As explained above (*see supra* at ¶¶ 6-7), the basis for all of plaintiff's allegations is their contention that the FTC Method inac-

curately measures the tar and nicotine content of "light" cigarettes. Compl. at ¶¶ 11, 12(b), 45. Plaintiff's allegations directed at the use of descriptors such as "light" are also inextricably intertwined with the purported failings of the FTC method: if the tar end nicotine ratings that form the basis of these descriptors were accurate, there would be no basis for plaintiff's claims that PM USA misrepresented Marlboro Lights to be "light."

45. These supposedly flawed tar and nicotine ratings were determined, not as a result of a discretionary decision by PM USA or any other tobacco company, but rather as a direct result of the FTC's mandates. The FTC established the testing system for measuring tar and nicotine, including specifying in great detail the parameters that were to be used. *See supra* at ¶¶ 19-24. The FTC reevaluated the propriety of its testing program in the face of the same criticisms that plaintiff raise in their complaint and specifically decided to retain the existing system. *See supra* at ¶¶ 28-31. The FTC initially conducted the tests in its own laboratories, and even when it finally transferred measurement responsibility to the industry, retained complete oversight to ensure that the tests were conducted according to its precise specifications. *See supra* at ¶¶ 23-27. The FTC made clear that it would be deceptive to use a measurement that was generated by a different system, even if the alternate method produced higher ratings. *See supra* at 24, 31. And the FTC directed that its testing method could form the basis for communications with consumers regarding the amount of tar and nicotine in cigarettes. *See supra* at ¶¶ 32-41. This exercise of control is more than sufficient to establish that PM USA acted under the direction of the FTC for purposes of removal.[1]

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[1] *But see Tremblay v. Philip Morris, Inc.*, 231 F. Supp. 2d 411 (D.N.H. 2002). In *Tremblay*, the court remanded a similar putative class action brought on behalf of smokers of Marlboro Light and Marlboro Ultralight. Although the court did not find that PM USA was acting under the direction of the FTC, the court recognized that the FTC had "endorsed the use of the Cambridge Filter Method," and its

C. PM USA Has a "Federal Defense" to Plaintiff's Claims

46. PM USA can easily establish that it has a colorable federal defense to plaintiff's claims. This second prong is not particularly stringent: "The defendant need not prove that he will actually prevail on his federal immunity defense in order to obtain removal; indeed, one of the most important reasons for removal is to have the validity of the [federal] defense of official immunity tried in a federal court." *Jamison v. Wiley*, 14 F.3d 222, 238 (4th Cir. 1994); *see also Pack*, 838 F. Supp. at 1103; *Arness*, 997 F. Supp. at 1272; *Fung*, 816 F. Supp. at 573. Thus, the "defense need only be plausible; its ultimate validity is not to be determined at the time of removal." *Magnin v. Teledyne Cont'l Motors*, 91 F.3d 1424, 1427 (11th Cir. 1996).

47. As illustrated by the FTC's long-standing tar and nicotine testing program, the Commission has made a series of deliberate policy judgments regarding the measurement and disclosure of tar and nicotine levels. For example, the FTC has made a clear policy determination that a standardized testing regime for tar and nicotine measurements is necessary; the FTC has defined the precise parameters of the testing method to be used; and the FTC has mandated that those measurements form the basis for all communications with consumers about tar and nicotine levels. *See supra* at ¶¶ 17-41. Underlying all

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ruling at least implied that the result might have been different if plaintiff there were deemed to have challenged the legitimacy of the FTC's testing program: "[n]owhere in the complaint do the plaintiff challenge the enforcement or wisdom of any FTC policy, procedure or regulation." *Id.* at 418-19. PM USA respectfully submits that *Tremblay* is incorrectly decided because the court there failed to recognize the extent to which plaintiff's claims necessarily challenged the decisions and policies underlying the FTC mandates in its tar and nicotine program. In any event, here it is clear from the face of the complaint that plaintiff's claims depend on the alleged faults of the FTC's testing system. *See, e.g.*, Compl. ¶¶ 9, 11, 12, 22(b), 34 (alleging FTC testing system registered lower levels of tar and nicotine than delivered to smokers).

of these decisions was the FTC's judgment that it was necessary to "augment information available to the public on the tar and nicotine content of cigarettes" based on "the proposition that lower yield cigarettes present a lessened hazard to the American public." 1968 FTC Report to Congress at 17.

48. These policy determinations are precisely what plaintiff challenge in their complaint; plaintiff essentially seek to hold defendants liable for adhering to the directions of the FTC's tar and nicotine program. In fact, to avoid liability under the theories expressed in plaintiff's complaint, PM USA would have had to acted directly contrary to the FTC's mandate and policies by launching a campaign publicly criticizing the failings of the FTC method and possibly even use an alternate test method. Plaintiff's claims thus inevitably conflict with the FTC's policy judgments, giving rise to a valid preemption defense. *See, e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (finding state law preempted by conflict with deliberate policy judgment of a federal agency).

D. There Is a Causal Connection Between Plaintiff's Claims and the Acts Performed Under the Direction of the FTC

49. PM USA can also establish the requisite causal connection between plaintiff's claims and the actions taken at the direction of the FTC. This third prong is not particularly stringent either. As the Supreme Court has explained, the "causal connection" test is met as long as the claims arise as a consequence of the defendant's carrying out official tasks and duties, regardless of whether those duties are actually required by federal law. *Mesa v. California*, 489 U.S. 121, 131-32 (1989). In fact, the causality standard is sufficiently broad that it can be satisfied even if the defendant is mistaken about the scope of its duty: "[section 1442(a)(1)] does not require that the prosecution must be for the very acts which the officer admits to have been done by him under federal authority. It is enough that his acts or his presence at the place in performance of his official duty constitute the basis,

though mistaken or false, of the state prosecution." *Id.* at 132 (internal quotation and citation omitted).

50. Here, as discussed above, plaintiff seek to assess liability for conduct – such as the use of the FTC's allegedly faulty tar and nicotine ratings – that was undertaken at the express direction of a federal agency. But for PM USA's adherence to the FTC's testing system, there would be no lawsuit. This is more than sufficient to satisfy the casual connection prong.

E. PM USA Is a "Person" Within the Meaning of Section 1442(a)(1)

51. Courts nationwide have recognized that corporations, no less than any other persons implementing federal policies, are entitled to the protection of the federal officer removal statute. *See, e.g., Miller v. Diamond Shamrock Co.*, 275 F.3d 414, 418 (5th Cir. 2001); *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 486 (1st Cir. 1989); *Peterson v. Blue Cross/Blue Shield*, 508 F.2d 55, 58 (5th Cir. 1975); *Pack v. AC & S, Inc.*, 838 F. Supp. 1099, 1102-03 (D. Md. 1993); *Blackman v. Asbestos Defendants*, 1997 WL 703773, at *2 (N.D. Cal. 1997); *Ruffin v. Armco Steel Corp.*, 959 F. Supp. 770, 773 (S.D. Tex. 1997); *Overly v. Raybestos-Manhattan*, 1996 WL 532150, at *2 (N.D. Cal. 1996); *Good v. Armstrong World Indus.*, 914 F. Supp. 1125, 1127-28 (E.D. Pa. 1996); *Crocker v. Borden*, 852 F. Supp. 1322, 1325 (E.D. La. 1994); *Bahrs v. Hughes Aircraft Co.*, 795 F. Supp. 965, 968-69 (D. Az. 1992); *Fung v. Abex Corp.*, 816 F. Supp. 569, 572 (N.D. Cal. 1992); *Ryan v. Dow Chem. Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992); *Bakalis v. Crossland Savings Bank*, 781 F. Supp. 140, 144 (E.D.N.Y. 1991). Because a "purely legal person such as a corporation could be engaged in activities that amount to the implementation of a federal policy under the direction of a government officer," corporations must be treated as "persons" for purposes of federal officer removal, or else the purpose of the statute would be frustrated. *Ryan*, 781 F. Supp. at 946.

SUBSTANTIAL FEDERAL QUESTION JURISDICTION

52. This Court may also properly exercise federal question jurisdiction over plaintiff's claims pursuant to 28 U.S.C. § 1331.

53. Generally, "[t]he presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). "[I]t is an independent corollary of the well-pleaded complaint rule," however, that "a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 22 (1983). Thus, regardless of whether a plaintiff's complaint on its face asserts only state causes of action, removal is proper where the lawsuit implicates a substantial federal question. *Ayres v. General Motors Co.*, 234 F.3d 514, 517-18 (11th Cir. 2000); *see also Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799 (4th Cir. 1996); *In re Wileless Telephone Radio Frequency Emissions Products Liab. Litig.*, 216 F. Supp. 2d 474 (D. Md. 2002).

54. For example, in a case analogous to the instant action, the District of Maryland exercised jurisdiction over an action against cell phone manufacturers that "alleg[ed] that defendants have negligently and fraudulently endangered the consuming public by providing wireless phones without headsets, knowing that these phones emit unsafe levels of radio frequency ('RF') radiation." *Wireless Telephone Radio Frequency Emissions Products Liab. Litig.*, 216 F. Supp. 2d 474, 479 (D. Md. 2002). The court began with a lengthy examination of the environment in which cell phone manufacturers operated, focusing in particular on the Federal Communications Commission's (FCC) exercise of regulatory authority over radiation levels in cell phones. The court noted that the FCC, after extensive consultation with various scientific experts, had set guidelines for acceptable radiation levels in cell phones. *Id.* at

483-87. In addition, the FCC had "already considered and rejected a headset requirement." *Id.* at 489.

55. With this environment in mind, the *Wireless Telephone* court had little difficulty in finding a substantial federal question sufficient for jurisdictional purposes. Although none of the claims "explicitly challenge[d] the FCC's radiation exposure guidelines," the court nevertheless recognized that the claims all inherently depended on the alleged faults in the FCC's guidelines: "the true gravamen of these complaints is to attack the lack of a headset requirement under the federal RF safety rules." *Id.* at 488. The court found that the federal interest was substantial because of the need for a uniform federal approach in determining acceptable cell phone radiation levels: "the risk of fifty different states articulating fifty different rules about whether and to what extent they may set RF safety standards could create market instability and prevent the maintenance of an unimpeded national network of rapid and efficient telecommunications service, a goal of significant importance to national commerce and security." *Id.* at 491. This risk of varying state standards was particularly important given that "one of the FCC's overriding goals is to design cellular service in a manner that will achieve nationwide compatibility." *Id.* at 483.

56. In short, "the central premise" of the *Wireless Telephone* plaintiff's claims was "that federal safety regulations governing wireless hand-held phones permit the sale of a product that is unreasonably dangerous to consumers," and thus plaintiffs could not prevail "without a court evaluating the validity and sufficiency of the federal standards." *Id.* at 491. The cell phone manufacturers had "the right to have such an evaluation take place in federal court," and removal was proper. *Id.* at 492; *see also Bryan v. BellSouth Telecommunications, Inc.*, 2003 WL 262333, *4 (M.D.N.C. 2003) (to extent plaintiff's claims challenged validity of FCC regulations relating to tariff collections, "these claims necessarily raise a substantial federal question over which federal courts may properly exercise jurisdiction").

57. The same reasoning is equally applicable to plaintiff's claims here. As discussed above, the "true gravamen" of the complaint here is "to attack" the FTC's measurement program. 216 F. Supp. 2d at 488. Plaintiffs specifically challenges the FTC testing method in their complaint, alleging that method is not accurate, Compl. at ¶¶ 11, 12(b), 45, and thus the "tar and nicotine yields" are "dilute[d]." *Id.* at ¶ 12(b). To prevail on their claims, plaintiffs must establish that the FTC method is misleading; if FTC ratings accurately reflect differences in tar and nicotine deliveries between cigarette brands, their claims must fail. *See supra* at ¶¶ 32-41. Accordingly, the trier of fact will inevitably be forced to "evaluat[e] the validity and sufficiency of the [FTC's] standards," an evaluation that defendants have the right to "take place in federal court." *Wireless Telephone*, 216 F. Supp. 2d at 4.

58. Like *Wireless Telephone*, the "risk of fifty different states articulating fifty different rules" regarding the measurement and disclosure of tar and nicotine levels creates a federal interest that is "substantial" for jurisdictional purposes. *Id.* at 491. Like the FCC in *Wireless Telephone*, the FTC has made clear that its testing method must be the sole method used for tar and nicotine measurements and communications: "use of more than one testing method, would only serve to confuse or mislead the public." "FTC To Begin Cigarette Testing," FTC Press Release at 2 (Aug. 1, 1967); *see also id.* at 1-2 ("the public interest requires that all test results presented to the public be based on a uniform method"); Letter from Carol M. Thomas to Michael I. Gastman (Sept. 26, 1976) ("it would be deceptive to advertise a tar figure which is higher than the latest applicable FTC tar figure . . . tar values which are set forth in cigarette advertisements must be consistent with the latest applicable FTC tar number"). Permitting these claims to be resolved under state law would create the risk of fifty different states reaching fifty different determinations as to the appropriate tar and nicotine testing regime, creating the very con-

fusion and lack of uniformity that the FTC was attempting to avoid.[2]

59. Given that plaintiff's claims necessarily challenge the FTC's forty year tar and nicotine measurement program, a substantial federal question is implicated, and this Court may exercise jurisdiction.

CONCLUSION

60. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1442(a)(1) and 1331 for the reasons stated above.

61. PM USA hereby reserves the right to amend or supplement this Notice of Removal.

62. PM USA hereby reserves all defenses, including, without limitation, the defense of lack of personal jurisdiction.

63. PM USA is providing plaintiffs, by and through their counsel, written notice of the filing of this Notice of Removal as required by 28 U.S.C. § 1446(d). Further, PM USA is filing a copy of this Notice of Removal with the Clerk of the Circuit Court, Pulaski County, Arkansas.

64. Pursuant to 28 U.S.C. § 1446(a), PM USA hereby attaches as **Exhibit A** a copy of all process, pleadings and other orders served upon such Defendant in the state court proceeding.

DATED this 2nd day of July, 2003.

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[2] If anything, the basis for substantial federal question jurisdiction is even stronger here than in *Wireless Telephone*. There the FCC merely determined the standards for permissible radiation levels in cell phones and had no subsequent involvement. By contrast here, as described above, the FTC has gone a step further by initially conducting the measurement testing in its own laboratories and then directing the industry to continue the testing program under the FTC's precise specifications and close supervision. *See supra* at ¶¶ 9-27. This distinction also explains why the *Wireless Telephone* court's rejection of federal officer removal, 216 F. Supp. 2d at 499-500, has no application to this case.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, P.L.L.C.
425 West Capitol Avenue
1800 TCBY Tower Building
Little Rock, Arkansas 72201
(501) 688-8800

/s/ R.T. Beard
R.T. Beard, III
Bar I.D. No. 71005

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1442 provides:

§ 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

28 U.S.C. § 1443 provides:

§ 1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

February 9, 2006

Mr. Curtis Layton Bowman
11311 Arcade Drive, Suite 200
P.O. Box 25438
Little Rock, AR 72212

Re: Lisa Watson, et al.
v. Philip Morris Companies, Inc., et al.
Application No. 05A725

Dear Mr. Bowman:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Alito, who on February 9, 2006 extended the time to and including March 20, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by /s/ ANN MCCAMEY
Ann McCamey
Case Analyst

[attached notification list omitted]

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

March 14, 2006

Mr. Curtis Layton Bowman
11311 Arcade Drive, Suite 200
P.O. Box 25438
Little Rock, AR 72212

Re: Lisa Watson, et al.
v. Philip Morris Companies, Inc., et al.
Application No. 05A725

Dear Mr. Bowman:

The application for a further extension of time in the above-entitled case has been presented to Justice Alito, who on March 14, 2006 extended the time to and including April 17, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by /s/ ANN MCCAMEY
Ann McCamey
Case Analyst

[attached notification list omitted]